



1-1-2002

An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners

E. Gary Spitko

Santa Clara University School of Law, gspitko@scu.edu

Follow this and additional works at: <http://digitalcommons.law.scu.edu/facpubs>

Recommended Citation

81 Or. L. Rev. 255

This Article is brought to you for free and open access by the Faculty Scholarship at Santa Clara Law Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

OREGON LAW REVIEW

Summer 2002

VOLUME 81

NUMBER 2

Articles

E. GARY SPITKO*

An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners

As cohabitation among unmarried couples becomes more common in the United States,¹ a most pressing challenge

* Associate Professor of Law, Santa Clara University. A.B., Cornell University; J.D., Duke University. I thank June Carbone, Dan Cole, Robin Feldman, Tom Galanis, Susan Gary, Adam Hirsch, Brad Joondeph, Ron Krotoszynski, Larry Waggoner, and participants in a Bay Area junior law faculty workshop for their comments on earlier drafts of this Article.

¹ See Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265, 1268 n.11 (2001) (citing to United States census data indicating that from 1970 to 1998 the number of cohabiting opposite-sex couples increased from 523,000 to 4,236,000 and that “[i]n 1998, there were eight unmarried opposite-sex couples for every 100 married couples, up from one per 100 in 1970); J. Thomas Oldham, *Lessons from Jerry Hall v. Mick Jagger Regarding U.S. Regulation of Heterosexual Cohabitants Or, Can’t Get No Satisfaction*, 76 NOTRE DAME L. REV. 1409, 1412 (2001) (concluding from studies indicating that cohabitation is “particularly popular among

facing inheritance law scholars, practitioners, and others who concern themselves with the development of inheritance law is to craft reforms that would, if implemented, better serve non-marital families while at the same time maintaining a reasonable ease of administration of estates.² One area in urgent need of such reform is intestacy law.³ Current intestacy law generally does not

the young" that "cohabitation will become an increasingly common family type in the United States"); Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435, 1435-36 (2001) (commenting that "research suggests that cohabitation has become less of an 'engagement' that serves as a prelude to marriage and more of an intimate arrangement that may serve as an alternative to it" and that "[t]his is reflected, for instance, in the declining percentage of cohabitators who eventually marry and in the fact that a portion of the declining rate of marriage is due to the increasing rate of cohabitation"); Jennifer K. Robbenolt & Monica Kirkpatrick Johnson, *Legal Planning for Unmarried Committed Partners: Empirical Lessons for a Preventive and Therapeutic Approach*, 41 ARIZ. L. REV. 417, 418 (1999) (reporting that in the past several decades in the United States rates of marriage among unmarried women have declined while rates of nonmarital childbearing and nonmarital cohabitation among unmarried couples have increased rapidly). See also Ira Mark Ellman, *Divorce Rates, Marriage Rates, and the Problematic Persistence of Traditional Marital Roles*, 34 FAM. L.Q. 1, 16 (2000) [hereinafter Ellman, *Divorce Rates*] (describing a major decline in the U.S. marriage rate from 1969 (149 marriages per 1000 unmarried women, fifteen to forty-four years of age) to 1988 (91 marriages per 1000 unmarried women, fifteen to forty-four years of age)).

² See Ellman, *Divorce Rates*, *supra* note 1, at 42 (remarking that "declining marriage rates may suggest that the law's treatment of nonmarital families will be increasingly important" and, more specifically, "[t]he persistence of gender roles [within non-marital partnerships] may suggest that long-term relationships between parties who have never formally married should . . . be treated similarly to marriage, because the parties' behavior may be little affected by the formalities with which they commenced their relationship"); Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 94 (1996) ("One of the increasingly notable shortcomings of modern probate law is its failure to provide adequate guidelines governing the inheritance rights of children outside the traditional nuclear family."); Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 115-16, 155-56, 163 (1994) (in arguing for a posthumous duty to support one's children, pointing out that permitting disinheritance of children disproportionately disadvantages children reared outside the traditional family because such children are less likely to benefit from their surviving parent taking a forced share of their decedent parent's estate in that "the disinherited cohabitant receives no statutory share which can trickle down for the children's benefit" and "in our multiple marriage society the surviving spouse often is not the parent of the testator's minor children"); Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROP. PROB. & TR. J. 683, 687 (1992) [hereinafter Waggoner, *Spousal Rights in Our Multiple-Marriage Society*] (noting that "[i]nvariably, this transformation of the family will increasingly exert new tensions on traditional wealth-succession laws").

³ See Mary Louise Fellows, *Pride and Prejudice: A Study of Connections*, 7 VA. J. SOC. POL'Y & L. 455, 466 (2000) (asserting that "heirship laws can accomplish their function if they conform to the notion of family as it evolves sociologically and not if

reflect as well as it could the way Americans today structure their family lives.⁴ For example, the intestacy statutes of forty-seven states make no provision for the survivor of a non-marital committed partnership.⁵

Committed partners can ameliorate the harshness of existing law and protect each other from disinheritance with effective estate planning.⁶ But many non-marital couples do not seek to do so, either because they procrastinate or because they mistakenly believe that the surviving partner will succeed to the decedent partner's property under their state's intestacy statute.⁷ Moreover, even where the partners have attempted to execute an estate plan that provides for the survivor of them, such a plan is subject to possible challenge by a partner's intestate heirs, such as sib-

they are tied exclusively to a definition of family determined through legal marriages").

⁴ See generally Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1 (2000) [hereinafter Gary, *Adapting Intestacy Laws*]; Margaret M. Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C. DAVIS L. REV. 917, 918, 928-36 (1989) (arguing that the exclusion of step-children from intestate distribution "is unfair and inconsistent with the purpose of the intestacy laws" and proposing reform that would bring step-children within intestacy scheme where decedent stood in loco parentis with respect to the step-child).

⁵ Vermont accords to the surviving partner of a civil union intestate inheritance rights equivalent to those it provides a surviving spouse. VT. STAT. ANN. tit. 15 § 1204(a), (e)(1) (Supp. 2001). Hawaii provides to a surviving reciprocal beneficiary a spouse's intestate share. HAW. REV. STAT. §§ 572C-1, 560:2-102 (Supp. 2001). And New Hampshire treats as a surviving spouse the survivor of an opposite-sex non-marital partnership in which the partners cohabited and held themselves out as husband and wife for at least a three-year period immediately preceding the intestate's death. N.H. REV. STAT. ANN. § 457:39 (1992).

⁶ See Andrew R. Lee, *Estate and Disposition Planning Issues for Same-Sex or Other Unmarried Couples*, TRUSTS & ESTATES 51 (Vol. 141, No. 1, Jan. 2002) (discussing need for unmarried couples to execute estate planning documents and take advantage of inter vivos gifting techniques to protect the surviving partner); Robbennolt & Kirkpatrick Johnson, *supra* note 1, at 434 ("In the absence of legislative or policy reform . . . [t]he preventive law emphasis on planning and prevention through the use of legal instruments can be used to accurately reflect the goals and circumstances of an unmarried committed couple.").

⁷ Robbennolt & Kirkpatrick Johnson, *supra* note 1, at 442 & n.132 (reporting the results of a survey in which "33.3% of respondents with opposite-sex partners (6 respondents) and 45.5% of respondents with same-sex partners (45 respondents) mistakenly believed that their partner would be among their heirs"); *id.* at 444 (reporting that of the "respondents [in a non-marital committed partnership] who claimed to 'know' who would inherit their estate, 34 of 52 persons without wills (65%) and 17 of 65 persons with wills (26%) [mistakenly] thought their partner would inherit their estate" if they died intestate, and concluding that "many people in unmarried committed partnerships without wills may not recognize the need under existing laws to specifically designate their partner as the beneficiary of their property if they so desire").

lings or even more distant relations, whom the law deems to be "natural" objects of an unmarried person's bounty.⁸

I have argued elsewhere in favor of revising Article II of the Uniform Probate Code to grant intestate inheritance rights to the intestate decedent's surviving committed but non-marital partner.⁹ Reform of the Uniform Probate Code to provide such intestate inheritance rights would further Article II's principal goal of promoting the donative freedom of the decedent.¹⁰ Further, such reform could be undertaken without unreasonably undermining Article II's expressed subsidiary goals including a desire for simplicity and certainty in the administration of estates.¹¹

Moreover, reform of Article II to include recognition of non-marital partnerships, and in particular gay and lesbian couples, would serve an expressive function.¹² By including intestate inheritance rights for a surviving non-marital committed partner,

⁸ See generally E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275 (1999) (arguing that "cultural minorities have cause to fear adjudication of their legal rights and responsibilities in a legal system dominated by majority-culture personnel").

⁹ See E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063 (1999) [hereinafter Spitko, *Expressive Function*].

¹⁰ *Id.* at 1067-76. See also T. P. Gallanis, *Default Rules, Mandatory Rules, and the Movement for Same-Sex Equality*, 60 OHIO ST. L. J. 1513, 1523 (1999) (arguing that the current Uniform Probate Code discriminates on the basis of sexual orientation because it contains default rules that fail to effectuate the likely intent of gay, lesbian and bisexual people).

¹¹ ALTA. LAW REFORM INST., REFORM OF THE INTESTATE SUCCESSION ACT, FINAL REPORT NO.78 100 (1999) (rejecting the concern that adoption of its recommended multi-factor approach to intestate inheritance rights for opposite-sex unmarried partners would "unduly" complicate the administration of estates and pointing out that "in other areas of the law, such as pension benefits, spousal support claims, and fatal accidents, it is possible to determine if a particular person falls into the class of cohabitant who is entitled to certain benefits or obligations"); Spitko, *Expressive Function*, *supra* note 9, at 1076-99. My review of Article II of the 1990 Uniform Probate Code concluded that Article II's six additional expressed values (in addition to the goal of promoting the decedent's donative intent) are (1) a desire for simplicity and certainty in succession law, (2) a de-emphasis of formalism, (3) a movement toward the unification of the subsidiary law of wills and will substitutes, (4) an endorsement of the "marital-sharing" theory, (5) a responsiveness to the changing nature of "family" and (6) a desire for multi-state uniformity in succession law. *Id.* at 1066.

¹² See Paula A. Monopoli, *"Deadbeat Dads": Should Support and Inheritance Be Linked?*, 49 U. MIAMI L. REV. 257, 275 (1994) ("Arguably, statutes governing inheritance should not only provide for the orderly distribution of property, but should send messages regarding societal values such as the obligation of fathers to support their children.").

an amended Article II would demonstrate that non-marital committed partnerships merit positive attention under succession law.¹³ Thus, reform might alter how society views these partnerships and, indeed, how the committed partners view their own relationship.¹⁴

The manner of identifying committed partners, as well as the fact of recognition itself, has the potential to shape behavior, to express societal support for the relationship, and to impact the ease of administration of estates. The different approaches to identification reflect different weighing of values in this process. Reform of intestacy law to include non-marital partners might take one of several approaches: a registration scheme, a multi-factor approach, or a combination registration/multi-factor approach.

Pursuant to a registration scheme, the intestacy statute would provide intestate inheritance rights to a surviving non-marital partner only if the partners had registered their partnership as prescribed by the statute prior to the intestate's death. For example, Hawaii provides an intestate share to a surviving non-marital partner where the partners had registered prior to the intestate's death as reciprocal beneficiaries.¹⁵

The registration approach has the virtue of certainty. Under the registration approach, a determination of who is entitled to take an intestate share as a surviving non-marital partner requires only an examination of the state's register for non-marital partners. This approach avoids a subjective inquiry by the factfinder into the quality of the survivor's relationship with the in-

¹³ Spitko, *Expressive Function*, *supra* note 9, at 1099-106.

¹⁴ Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 8, 22, 90-91 (1998) [hereinafter Fellows et al., *Committed Partners*] (supporting the assertion that intestacy statutes shape social norms and the definition of family by pointing to the recognition by intestacy statutes of the right of adopted children to take as heirs of the adopting parent's own ancestors and collateral relatives and the effect of such recognition in breaking "the stranglehold blood ties had on the definition of family"). See also Spitko, *Expressive Function*, *supra* note 9, at 1100-01. Cf. Gary, *Adapting Intestacy Laws*, *supra* note 4, at 13 ("With respect to the type of family the intestacy statute supports, the definition of family may reflect society's view both of what a family is and what a family should be.").

¹⁵ HAW. REV. STAT. § 572C-1 to -7 (Supp. 2001). Generally, Hawaii reserves reciprocal beneficiary status for same-sex couples and for mixed-sex couples composed of partners who are prohibited from marrying one another by reason of consanguinity. See *id.* § 572C-4(3). See also VT. STAT. ANN. tit. 15, § 1204(e)(1) (Supp. 2001) (providing a spouse's share of the decedent's intestate estate to a same-sex surviving non-marital partner who was the intestate's civil union partner).

testate so as to determine whether the survivor merits recognition under the intestacy scheme.¹⁶ A principal drawback of this approach to reform, however, is its underinclusiveness. The registration approach fails to recognize the surviving non-marital partner where the partners chose not to register or simply neglected to do so.¹⁷

A second approach to reform, that addresses the underinclusiveness concern, is the multi-factor approach.¹⁸ Pursuant to a multi-factor approach, the non-marital partners need not have registered their relationship in order that the survivor of them might be entitled to a share of the intestate estate of the first of them to die. Rather, the survivor may assert her entitlement to an intestate share based upon the nature and quality of her relationship with the intestate. The court must then evaluate that claim by considering whether the nature and quality of the claimant's relationship with the intestate was such that it is appropriate that she be awarded an intestate share. The intestacy statute guides the court in making this subjective inquiry by setting out factors that the court might find relevant and helpful in evaluating the quality of the partners' relationship.

The principal concern with the multi-factor approach is the extent to which a subjective inquiry might undermine certainty in

¹⁶ See Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1652-58 (1991) (arguing that a registration system for recognition of "nontraditional adult relationships" is preferable to a functional approach in that, unlike the latter, it avoids an indeterminate and intrusive inquiry into the claimants' personal lives and avoids requiring that "all alternative families resemble traditionally recognized relationships in function, if not in precise form").

¹⁷ The partners might choose not to register their relationship for fear of discrimination they might suffer as a consequence of registration. To address this fear, the intestacy statute might provide a non-disclosure option for registrants. That is, the statute might provide that the state shall not disclose to the public the names of registrants who express a preference that the fact of their registration not be disclosed to the public. Of course, this safeguard would not allay the fears of partners who feared state discrimination against them based upon the nature of their relationship or their sexual orientation. As an alternative safeguard, the statutory scheme might provide for truly private registration of non-marital partnerships for the purposes of the intestacy scheme. See Spitko, *Expressive Function*, *supra* note 9, at 1081-86 (arguing that a registration procedure for committed partners that did not require public registration, but rather allowed partners to convey committed partner status upon each other for the purposes of the intestacy statute by means of a written unattested document, would be consistent with the Uniform Probate Code's harmless error principle for the execution of wills).

¹⁸ See generally Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21 (1994) [hereinafter Waggoner, *Marital Property Rights*].

administering the intestacy scheme. In a jurisdiction that allows for a multi-factor inquiry, the property owner and her presumptive heirs might be less certain during the property owner's life as to how her intestate estate will be distributed at her death. Moreover, a court's multi-factor inquiry might require a large expenditure of judicial resources as well as the expenditure by the claimant and those who oppose her claim of a great deal of time and financial resources.

To reduce the uncertainty of the multi-factor approach while still avoiding underinclusiveness, a third approach to reform combines a registration system with a multi-factor approach.¹⁹ In allowing the partners to register their relationship, the combination or hybrid approach allows those who take advantage of the registration process to ensure that the surviving partner will be an intestate heir in the case of intestacy. Thus, the partners are able to avoid the uncertainty and the delay and expense of a multi-factor inquiry.

The combination approach seeks to maintain inclusiveness by allowing for a multi-factor inquiry in cases in which an intestate is survived by a putative non-marital partner but the partners did not register the partnership during the intestate's life. In allowing for such a multi-factor inquiry, the combination approach introduces uncertainty in a reduced number of cases (as contrasted with a pure multi-factor approach) into administration of the intestacy scheme. In cases in which the intestate had died while unregistered but also in a relationship that arguably meets the standard for a committed partnership set out in the intestacy statute, the combination approach allows for the survivor to assert a claim for an intestate share and, thus, to subject the administration of the intestate estate to whatever uncertainty and expense arises with a claim under a pure multi-factor approach.²⁰

¹⁹ See Fellows et al., *Committed Partners*, *supra* note 14, at 64 (advocating this type of dual registration/multi-factor approach); Spitko, *Expressive Function*, *supra* note 9, at 1087 n.125 (citing to letters from Professor Lawrence Waggoner to various law reform organizations in which Professor Waggoner, the drafter of a leading multi-factor approach proposal, advocates the combination approach).

²⁰ A combination approach jurisdiction might seek to further reduce uncertainty by setting a higher burden of proof for a claimant who seeks to demonstrate her surviving partner status pursuant to the multi-factor inquiry, in light of the fact that the claimant and the decedent did not take advantage of a registration scheme available to them. The parties' failure to do so does suggest a greater likelihood that the couple was not sufficiently committed such that the survivor should take an intestate share.

In this present Article, I now consider how one might best structure a multi-factor approach (or the multi-factor component of a combination approach) intestacy scheme granting intestate inheritance rights to the surviving committed partner of an intestate decedent. Two issues appear paramount. First, how should the intestacy scheme qualify an individual as a surviving committed partner entitled to take an intestate share under the scheme?²¹ Second, to what portion of the decedent's intestate estate should the qualifying surviving committed partner be entitled? With respect to this second issue—the size of the surviving committed partner's intestate share—the broad principles of the proposal I offer in this Article, employing an accrual approach to determining the size of the intestate share, and much of its supporting analysis, would apply with equal force to determining the size of an intestate share afforded to a committed partner pursuant to an intestacy scheme that employs a registration approach. Indeed, these broad principles and rationales underlying my proposed accrual approach would apply also to the determination of the size of an intestate share accorded to a surviving legal spouse.

My proposal derives from an emphasis on four values: For both consequentialist and non-consequentialist reasons, which are set out below,²² I seek to promote the donative intent of the intestate property owner, to reward the surviving partner who contributed to the financial, physical, or emotional well-being of the intestate, to protect the reliance interests of the surviving partner, and to safeguard the ease of administration of estates.²³ These values inform my proposal with respect to both the qualification of a committed partner and the portion of the decedent's intestate estate to which she is entitled.

With respect to the portion of the intestate estate to which a surviving committed partner shall be entitled, I propose the use of an accrual method. Pursuant to this approach, the size of the intestate share awarded to a surviving committed partner is pro-

²¹ See *American Law Institute Debates Domestic Partnership Agreements*, 26 Fam. L. Rep. (BNA) No. 28, at 1352-53 (May 23, 2000) (reporting that the issue of when a domestic partnership exists proved to be one of the most contentious issues at the American Law Institute's 77th Annual Meeting discussion of the ALI's Principles of the Law of Family Dissolution with respect to the issue of how a court should deal with the break-up of a domestic partnership).

²² For a discussion of consequentialist and non-consequentialist approaches to answering policy questions, see Robin Cooper Feldman, *Consumption Taxes and the Theory of General and Individual Taxation*, 21 VA. TAX REV. 293 (2002).

²³ See *infra* notes 59-146, and accompanying text.

portional to the duration of the committed partnership cohabitation period.²⁴ In addition, my intestacy scheme would allow for the “ex-partner” of a decedent from a relationship that fractured shortly before the decedent’s death to claim an intestate share. The ex-partner would be entitled to a portion of the intestate estate proportional to the duration of the partnership cohabitation period discounted in proportion to the time elapsed between the fracture and the intestate’s death.²⁵ Moreover, I would apply the accrual/multi-factor approach to govern the passing of intestate property even in cases in which the decedent committed partner died partially testate.²⁶ To promote certainty and ease of administration, however, my proposal would, in certain circumstances, deny standing to a claimed committed partner to challenge a decedent’s will when the surviving committed partner cannot demonstrate that she and the decedent cohabited in a committed partnership for nine years or greater duration.²⁷

With respect to the qualification of a committed partner, my proposal asks the court to focus its inquiry on twenty-three enumerated factors that directly implicate the values that my proposed intestacy scheme seeks to promote.²⁸ The presence of these factors tends to indicate that the claimant and the decedent lived life together as a couple in an emotionally and physically intimate partnership, that the decedent would want the survivor to take an intestate share, that the survivor contributed to the decedent’s financial, physical or emotional well-being, or that the survivor had come to rely upon the decedent for her financial security. I group these factors accordingly to focus the court’s inquiry on the underlying values. My proposal limits the ability of a court to consider one arguably relevant factor—the sexual exclusivity of the parties’ relationship—because I have serious concerns about the use of such a factor. My proposal requires that “[i]f the court finds that the parties lived together in a sexually exclusive relationship during their cohabiting partnership, the court shall weigh this factor in favor of finding that the parties lived life together in an emotionally and physically intimate partnership” but the court may not otherwise consider evidence

²⁴ See *infra* notes 147-74, and accompanying text.

²⁵ See *infra* notes 175-91, and accompanying text.

²⁶ See *infra* notes 192-99, and accompanying text.

²⁷ See *infra* notes 200-08, and accompanying text.

²⁸ See *infra* notes 240-65, and accompanying text.

relating to the sexual exclusivity of the parties' relationship.²⁹

Finally, my proposal also includes the objective requirement of a three-year minimum duration for the cohabiting committed partnership before a surviving partner may assert a claim for a share of the intestate decedent's estate. This requirement greatly promotes certainty by narrowing the pool of potential claimants and eliminating those potential claimants most likely to have a weak or borderline claim. The minimum duration also is well grounded in the intent, reliance, and reciprocity rationales of my scheme.³⁰

In the remainder of this Article, I set out the details of and the rationale for my proposed accrual/multi-factor approach to intestate inheritance rights for unmarried committed partners. Part I of the Article sets out, as a starting point for discussion, Professor Lawrence Waggoner's leading multi-factor proposal for inclusion of unmarried committed partners within the intestacy scheme.³¹ In Part II of the Article, I discuss my choice of values to ground my proposed reform.³² In Part III, I set out an accrual method for calculating the portion of the intestate estate to which the surviving committed partner is entitled and explain how this accrual method promotes the values of donative intent, reliance, reciprocity, and ease of administration.³³ Finally, in Part IV of the Article, I discuss how these values relate to the factors I have chosen to be used for the qualification of a surviving committed partner.³⁴

I

A STARTING POINT FOR DISCUSSION: PROFESSOR WAGGONER'S WORKING DRAFT

In thinking through these issues—who shall qualify as a committed partner and what portion of the decedent's intestate estate shall they take—I need not work from scratch. Indeed, Professor Lawrence Waggoner has set forth as a “Working Draft”³⁵ an influential and leading American proposal to reform

²⁹ See *infra* notes 266-85, and accompanying text.

³⁰ See *infra* notes 211-39 and accompanying text.

³¹ See *infra* notes 35-56 and accompanying text.

³² See *infra* notes 57-146 and accompanying text.

³³ See *infra* notes 147-208 and accompanying text.

³⁴ See *infra* notes 209-85 and accompanying text.

³⁵ Professor Waggoner has set out the most recent version of his proposal, which he offers as an amendment to the Uniform Probate Code, in a “Working Draft”

intestacy law to include intestate inheritance rights for unmarried committed partners by means of a multi-factor approach.³⁶

An interesting feature of the Waggoner Working Draft is that it does not apply at all in cases of partial intestacy. The Working Draft provides an intestate share for a surviving committed partner only where an "adult decedent dies without a valid will."³⁷ Thus, if the decedent dies with a valid will that fails to dispose of all of her probate property, the decedent's property that passes by intestacy is not governed by the Working Draft.³⁸

The Working Draft divides surviving committed partners into two groups for the purposes of determining the portion of the intestate estate to which the surviving committed partner is entitled. In cases in which the decedent is not survived by either a descendant or a parent, and in cases in which the decedent is survived by one or more descendants, all of whom are also descendants of the surviving committed partner, the survivor is entitled to the first \$50,000 of the intestate estate and, in addition, to one half of the remainder of the intestate estate.³⁹ In all other cases, the Working Draft provides to a surviving committed partner one half of the decedent's intestate estate.⁴⁰

As is generally the rule with extant intestacy statutes, the Working Draft does not take into account the duration of the relationship between the intestate and the heir in determining

dated January 1995 [hereinafter Working Draft]. See LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS AND FUTURE INTERESTS, 108-09 (3d ed. 2002) [hereinafter WAGGONER ET AL., FAMILY PROPERTY LAW]. Professor Waggoner's revised Working Draft is set forth in Appendix A.

³⁶ See generally Waggoner, *Marital Property Rights*, *supra* note 18. See also ALTA. LAW REFORM INST., *supra* note 11, at 103-06, 116, 118, 123 (discussing the Waggoner Working Draft and recommending adoption of several of its features).

³⁷ *Infra* Appendix A § (a).

³⁸ Professor Waggoner designed the Working Draft not to apply in cases of partial intestacy "to reduce the risk that an older widow and widower who lived together for convenience or to save expenses or for companionship, etc., would . . . get caught by the statute." His assumption was that each might have a will favoring each's own children from a former marriage, that neither would want any property to go to the survivor, and that any partial intestacy would be inadvertent. E-mail from Lawrence W. Waggoner, Lewis M. Simes Professor of Law, University of Michigan Law School to Gary Spitko, Associate Professor, Santa Clara University School of Law, Dec. 28, 2001 (on file with author).

³⁹ *Infra* Appendix A § (a)(1). The Working Draft brackets the \$50,000 figure, denoting that this figure is a recommended amount but a legislature might wish to provide for a lesser or greater amount. See *id.*

⁴⁰ *Infra* Appendix A § (a)(2).

the portion of the intestate share to which the heir is entitled.⁴¹ Under the Working Draft, the duration of the committed partnership is irrelevant to the size of the intestate share that the surviving partner takes. For example, all else being equal, the surviving partner of a thirty-year committed partnership takes a share equal to that taken by the surviving partner of a three-year committed partnership.

Moreover, under the Working Draft, the surviving partner of a long-term committed partnership takes less than a surviving legal spouse of a short-term marriage would take pursuant to the Uniform Probate Code under otherwise similar circumstances.⁴² For example, as noted above, under the Working Draft, when the decedent is survived by a committed partner but is not survived by a parent or a descendant, or is survived by one or more descendants all of whom are also descendants of the surviving committed partner, the survivor is entitled to the first \$50,000 of the intestate estate plus one half of the remainder of the intestate estate.⁴³ The Uniform Probate Code would give to a legal spouse in these circumstances the entire intestate estate.⁴⁴

Indeed, for an intestate estate of any given size greater than \$50,000, under the Working Draft no surviving committed partner would ever take a share of her partner's intestate estate as large as that given to a surviving spouse pursuant to the Uniform Probate Code's intestacy provisions. The best that a surviving committed partner might do under the Working Draft is to take the first \$50,000 of the decedent's intestate property plus one-half the balance of the intestate estate. In contrast, the worst that a surviving spouse might do under the Uniform Probate Code's intestacy provisions is to take the first \$100,000 of the decedent's intestate property plus one-half the balance of the intestate estate.⁴⁵

⁴¹ *But see* CAL. PROB. CODE § 6454 (West 2002) (requiring that a child/foster parent or child/step-parent relationship have begun during the child's minority in order for a parent/child relationship to exist with respect to such a parent and child for purposes of intestate succession).

⁴² *See generally* UNIF. PROBATE CODE § 2-102 (amended 1997) (providing for the intestate share of a decedent's surviving spouse).

⁴³ *See supra* note 39, and accompanying text. *See also infra* Appendix A § (a).

⁴⁴ *See* UNIF. PROBATE CODE § 2-102(1) (amended 1997).

⁴⁵ *See id.* § 2-102(4) (providing to a surviving spouse the first \$100,000 of the intestate estate plus one-half the balance of the intestate estate in cases where the decedent spouse is survived by descendants who are not descendants of the surviving spouse).

Professor Waggoner intended for his Working Draft to be less rewarding to a surviving committed partner than is parallel intestacy law with respect to a legal spouse “to maintain the incentive to enter into a formal marriage.”⁴⁶ Professor Waggoner acknowledges that this disparate treatment of committed partners and legal spouses might be inappropriate with respect to those committed partners who are unable to marry each other on account of their sex.⁴⁷ He suggests, therefore, that it may be appropriate for an intestacy statute to provide for a larger share to the survivor of a same-sex committed partnership as contrasted with the share provided to the survivor of a mixed-sex committed partnership.⁴⁸

In determining who shall qualify as a surviving committed partner, the Working Draft first sets out several objective requirements intended to narrow the pool of potential claimants, thus, lessening the burden on the probate system and limiting the amount of uncertainty introduced by this reform of the intestacy scheme.⁴⁹ First, no claim for a committed partner’s share may be filed against the intestate estate of a decedent who was a minor or who was married at her death.⁵⁰ In addition, the claimant herself must have been an adult unmarried to anyone at the decedent’s death but must not have been prohibited by law from marrying the decedent by reason of consanguinity.⁵¹ Finally, the

⁴⁶ Waggoner, *Marital Property Rights*, *supra* note 18, at 80.

⁴⁷ *Id.* at 80 n.143.

⁴⁸ *Id.* The lesser award to a committed partner under the Working Draft can be justified also on the ground that it is easier to be confident concerning the nature of a decedent’s relationship with a spouse as contrasted with a decedent’s relationship with a (non-registered) committed partner. *But see* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 4.12, cmt. b (2002) stating that:

The precise rates chosen by the rulemaker under Paragraphs (1) and (2) [for recharacterizing a spouse’s separate property as marital property depending on the duration of the marriage] are not compelled by any fundamental principle and are therefore not specified in this section. The rationale for § 4.12 does suggest bounds, however. In the ordinary case of a marriage that has lasted for 30 or 35 years, spouses will have made many important and largely irreversible life decisions premised upon a shared economic fate, including shared access to assets either brought into their marriage. By that time, a complete recharacterization of separate property the parties held at the time of their marriage is therefore appropriate as the default rule.

⁴⁹ *See infra* Appendix A § (b); Waggoner, *Marital Property Rights*, *supra* note 18, at 81-82.

⁵⁰ *Infra* Appendix A § (a).

⁵¹ *Id.* § (b)(i) & (ii).

claimant must have been “sharing a common household” with the decedent at the decedent’s death.⁵²

Having thus narrowed the pool of potential claimants, the Working Draft next calls for a subjective inquiry into whether the claimant was living in a “marriage-like relationship” with the decedent at the decedent’s death.⁵³ The Working Draft sets out six factors that a court should consider, among others that the court might find relevant, in deciding whether the decedent and the claimant enjoyed a “marriage-like relationship.”⁵⁴ Finally, the Working Draft provides for a rebuttable presumption that the relationship at issue was “marriage-like” if the claimant and the decedent engaged in one or more of four specified behaviors: sharing a common household for a prescribed minimum period, registering as domestic partners, participating in a commitment ceremony certified in writing by an organization, and co-parenting a child together.⁵⁵

Professor Waggoner offered his proposal “as a starting point for discussion” with the hope that it would spark dialogue about the need for reform of intestacy statutes and the best approach to such reform.⁵⁶ In that spirit, in this Article, I use the Waggoner Working Draft as my “starting point for discussion” of how a jurisdiction might best structure an intestacy statute that utilizes a multi-factor approach to provide inheritance rights to a surviving non-marital committed partner. My proposal for reform, which is set forth in Appendix B, borrows much from Professor Waggoner’s Working Draft. As set out below, however, my proposal departs from the Working Draft in numerous important respects.

⁵² *Id.* § (b)(iii).

⁵³ *Id.* §§ (b)(iii) & (d).

⁵⁴ *Id.* § (d). Professor Waggoner’s Working Draft was greatly influenced by case law in the factors that it cites as relevant to a court’s determination as to whether a relationship was “marriage-like.” In particular, the Working Draft borrows heavily from the courts’ decisions in *Braschi v. Stahl Assocs.*, 543 N.E.2d 49 (N.Y. 1989) and in *Warden v. Warden*, 676 P.2d 1037 (Wash. Ct. App. 1984). See Waggoner, *Marital Property Rights*, *supra* note 18, at 76-80. Professor Waggoner also relied in crafting his proposal upon similar proposals set forth by the Queensland Law Reform Commission and upon Sweden’s Law on Cohabitant’s Mutual Home. See *id.* at 78 n.141.

⁵⁵ *Infra* Appendix A § (e). The respondent may rebut the presumption by a preponderance of the evidence if the claimant has established only one of the four listed behaviors. The respondent may rebut the presumption only by clear and convincing evidence if the claimant has established more than one of the four listed behaviors. *Id.* § (f).

⁵⁶ Waggoner, *Marital Property Rights*, *supra* note 18, at 78.

II

THE VALUES THAT SHOULD BE REFLECTED IN THE
INTESTACY PROVISIONS RECOGNIZING
COMMITTED PARTNERS

In designing any intestacy scheme, one might do well to start by considering the values that the intestacy scheme will seek to further.⁵⁷ I begin, therefore, by asking what values should be served by an intestacy scheme's provisions that recognize the decedent's surviving committed partner. As noted above, I seek to design an intestacy scheme that would serve four principal values: donative freedom, reciprocity, reliance, and ease of administration.⁵⁸

A. *Donative Intent*

There is widespread acceptance among succession law scholars that it is and should be an important goal of any intestacy scheme to further the donative intent of the intestate property owner.⁵⁹

⁵⁷ See Gary, *Adapting Intestacy Laws*, *supra* note 4, at 13 (2000) ("At issue in thinking about intestacy statutes is not only what a decedent wants, but what society wants. Should family be supported, and if so, should a statute attempt to determine the decedent's view of who his or her family is, or should the statute create a definition of family based on a societal view of family?").

⁵⁸ Additional principles that have been cited as common goals or limitations of intestacy statutes include strengthening family, encouraging the accumulation of wealth, maintaining the dominance of the private property regime, promoting respect for the legal system, and avoiding excessive complication of property titles and excessive subdivision of property. Gary, *Adapting Intestacy Laws*, *supra* note 4, at 9; *id.* at 27 ("Intestacy statutes attempt to distribute a decedent's property to the decedent's family, either because the intestacy statute strives to approximate the decedent's wishes or because society has decided that intestacy statutes should benefit and strengthen families if a decedent does not express a contrary wish in a will."); Anne-Marie E. Rhodes, *Abandoning Parents Under Intestacy: Where We Are, Where We Need to Go*, 27 IND. L. REV. 517, 546 (1994) (suggesting that allowing a parent who has abandoned her minor child to take an intestate share from the child's estate undermines the perceived fairness of the legal system); Fellows et al., *Committed Partners*, *supra* note 14, at 8 (commenting that intestacy statutes "reflect society's commitment to: (1) donative freedom; (2) equity, meaning concerns about fairness and protection of reliance interests; and (3) family"); *id.* at 12 (stating that intestacy statutes seek to distribute intestate property in a manner that expectant takers believe to be fair, thus, avoiding "disdain for the legal system"); *id.* at 13 n.62 (identifying as additional objectives of intestacy laws avoiding the excessive subdivision of property and related complicated property titles, and encouraging the private accumulation of wealth).

⁵⁹ Gary, *Adapting Intestacy Laws*, *supra* note 4, at 7 ("The most commonly identified goal of intestacy statutes is to create a dispositive scheme that will carry out the probable intent of most testators."); Fellows et al., *Committed Partners*, *supra* note

The first goal of my proposed intestacy statute reform, therefore, is to promote better the donative intent of the intestate who has died survived by a non-marital committed partner.⁶⁰ The intestate distribution scheme should seek, to some great degree, to distribute intestate property to the committed partner as the property owner would have provided had she thought about the matter and set forth her wishes.⁶¹

Recent empirical work by Professor Mary Louise Fellows and her colleagues at the University of Minnesota strongly supports the proposition that reform of intestacy law to recognize the inheritance rights of surviving committed partners would better promote the intent of the intestate who has died while in a non-marital committed partnership.⁶² Professor Fellows and her colleagues surveyed and reported on the attitudes of several groups with respect to the provision of intestate inheritance rights for unmarried committed partners.⁶³ In general, the Fellows survey found that a substantial majority of the respondents in each respondent group—those living in a committed non-marital partnership, as well as a substantial majority of the general public—would prefer that a surviving committed partner take as an heir a portion of the decedent partner's intestate estate.⁶⁴

B. Reciprocity

A second goal of my proposed intestacy scheme reform is to promote the norm of reciprocity as it relates to the actions of the committed partners during the course of their partnership. That is, the intestacy scheme should seek to reward or compensate those committed partners who assisted the intestate in the ac-

14, at 8 (commenting that intestacy statutes reflect society's commitment to donative freedom).

⁶⁰ See Gallanis, *supra* note 10, at 1522 (arguing that the Uniform Probate Code's intestacy provisions, as well as the Uniform Health-Care Decisions Act and the Uniform Guardianship and Protective Proceedings Act, "cry out for reform" because they fail to fulfill their stated objective "to mirror the likely intent of the [gay or lesbian] patient, ward or decedent").

⁶¹ Gary, *Adapting Intestacy Laws*, *supra* note 4, at 7-8 ("To the extent possible, the statute should distribute the property to the persons the decedent would have chosen to receive the property if the decedent were making the decision.").

⁶² See generally Fellows et al., *Committed Partners*, *supra* note 14.

⁶³ The four groups that Professor Fellows and her colleagues surveyed were (1) the general public, (2) persons in a committed non-marital mixed-sex relationship, (3) men in a committed same-sex relationship, and (4) women in a committed same-sex relationship. Fellows et al., *Committed Partners*, *supra* note 14, at 9.

⁶⁴ *Id.* at 89.

cumulation of her wealth or who provided for the intestate's physical, emotional or financial needs.⁶⁵ One justification for incorporating the value of reciprocity into intestacy provisions recognizing unmarried committed partners is the notion that the surviving committed partner earned a portion of the intestate property through her contributions to the decedent partner, and their partnership, even though the property was acquired by the decedent partner and titled in the decedent's name.⁶⁶ A second justification for incorporating reciprocity is the aspiration that the intestacy statute will promote a better society to the extent that it recognizes, rewards and, thus, promotes care-taking behaviors. And it makes sense that the contributor/caretaker be rewarded from the estate of the person who received her contribution or care-taking.

American succession law incorporates this value of reciprocity to only a slight degree. One important example of modern succession law's concern with reciprocity is found in the 1990 Uniform Probate Code's elective share.⁶⁷ In general, an elective share, also known as a forced share, allows a surviving spouse to assert a claim for a portion of the decedent spouse's estate even where the decedent spouse intentionally disinherited the surviving spouse.⁶⁸ The traditional rationale for such protection

⁶⁵ See *id.* at 14 (describing the view that intestacy law "is part of a state's statutory scheme to support family functions, such as child rearing and mutual financial responsibility" and concluding that "[w]ithin this understanding of intestacy, a recognition of inheritance rights for surviving committed partners would further the state's objectives"); Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551, 588 (1999) ("[A] devise flows naturally as the final act of reciprocity in an ongoing relationship—inheriting is viewed as a statement of reward, and so long as family members have taken care of each other, they expect the reciprocal nature of the relationship to continue to the end"); Francis H. Foster, *Linking Support and Inheritance: A New Model From China*, 1999 WIS. L. REV. 1199, 1257 [hereinafter Foster, *Linking Support and Inheritance*] (criticizing American inheritance law for failing to reward those who supported the decedent and concluding that "mechanical status-based rules prevail at the expense of individual justice").

⁶⁶ See Monopoli, *supra* note 12, at 286 (discussing the theories of Locke and John Stuart Mill tying rights over private property to the exertion of labor in acquiring that property in support of her argument that parental intestate inheritance from a child can be justified when a parent has "invest[ed] time, energy and money in raising" the decedent child, but cannot be justified on the basis of expended labor where the parent had failed to support or abandoned the child).

⁶⁷ See generally UNIF. PROBATE CODE §§ 2-201 through 2-212 (amended 1997).

⁶⁸ Traditional elective share statutes differed as to whether the surviving spouse could assert a claim only against the decedent's probate estate (property passing by will) or also against the decedent's property passing by will substitutes.

against disinheritance was to ensure some means of support for the surviving spouse and to guard against the surviving spouse becoming a public charge.⁶⁹

The primacy of the support rationale for the elective share has given way to some degree in recent years, however, to a reciprocity rationale.⁷⁰ The modern notion, sometimes labeled the “partnership theory of marriage,” is that the surviving spouse who contributed to the accumulation of the decedent’s property is entitled, in light of that contribution, to a share of that property at the decedent’s death regardless of how the property was titled.⁷¹ The general comment to the 1990 Uniform Probate Code’s elective share explains that, pursuant to this rationale, “the law grants each spouse an entitlement to compensation for non-monetary contributions to the marital enterprise, as ‘a recognition of the activity of one spouse in the home and to compensate not only for this activity but for opportunities lost.’”⁷²

The structure of the 1990 Uniform Probate Code’s elective share reflects the ascension of this reciprocity rationale.⁷³ Prior to the 1990 revisions, the Uniform Probate Code’s elective share allowed the surviving spouse to claim a one-third share of the decedent spouse’s estate, regardless of the duration of the mar-

⁶⁹ Alan Newman, *Incorporating the Partnership Theory of Marriage into Elective-Share Law: The Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative*, 49 EMORY L.J. 487, 493 n.29 (2000).

⁷⁰ See Susan N. Gary, *Marital Partnership Theory and the Elective Share: Federal Estate Tax Law Provides a Solution*, 49 U. MIAMI L. REV. 567, 577-82 (1995) [hereinafter Gary, *Marital Partnership Theory*] (identifying the need and marital partnership rationales as the “two main theories” that serve as rationales for the elective share and discussing these rationales).

⁷¹ See Newman, *supra* note 69, at 493 n.29.

⁷² See UNIF. PROBATE CODE, Part 2 (Elective Share of Surviving Spouse), general cmt. (amended 1997), quoting Mary Ann Glendon, *The Transformation of Family Law* 131 (1989).

⁷³ See *id.* (stating that the principal goal of the 1990 revisions to the Uniform Probate Code’s elective share provisions was “to bring elective-share law into line with the contemporary view of marriage as an economic partnership”). The 1990 Uniform Probate Code’s elective share remains concerned also with the spouses’ mutual duty of support. Section 2-202(b) provides a surviving spouse with a “supplemental elective-share amount,” suggested to be \$50,000, related to the surviving spouse’s actual needs but unrelated to the duration of the marriage—that is, unrelated to the contribution of the surviving spouse to the decedent’s accumulation of her property. UNIF. PROBATE CODE § 2-202(b) (amended 1997); UNIF. PROBATE CODE Part 2 (Elective Share of Surviving Spouse), general cmt. (amended 1997) (“The redesigned elective share system implements the support theory by granting the survivor a supplemental elective-share amount related to the survivor’s actual needs.”).

riage. This flat percentage approach failed to implement well the partnership principle. The spouse of a very short-term marriage, who had contributed very little to the accumulation of the decedent's wealth, and the spouse of a very long-term marriage, who had contributed greatly to the accumulation of most or all of the decedent's wealth, were entitled to the same portion of their respective decedent spouse's estate.⁷⁴

In contrast, the 1990 Uniform Probate Code's elective share better implements the partnership theory by using an elective share-percentage that increases as the duration of the marriage increases.⁷⁵ This elective-share percentage is then multiplied by the value of the "augmented estate."⁷⁶ Credits are then subtracted from the product to give the amount from the decedent's estate to which the survivor is entitled.⁷⁷ Thus, all else being equal, the surviving spouse of a long-term marriage will be entitled to assert a claim for a greater share of the decedent spouse's estate as compared to the claim of the surviving spouse of a short-term marriage.⁷⁸

⁷⁴ See UNIF. PROBATE CODE Part 2 (Elective Share of Surviving Spouse), general cmt. (amended 1997) (illustrating this point with several fact scenarios under conventional elective share law).

⁷⁵ See UNIF. PROBATE CODE § 2-202(a) (amended 1997) (setting forth the schedule for the elective-share percentage).

⁷⁶ *Id.*; see also *id.* at §§ 2-203 through 2-208 (setting out the composition of the augmented estate).

⁷⁷ *Id.* § 2-209.

⁷⁸ For an exploration of how the modern Uniform Probate Code elective share statute falls short in implementing the partnership theory of marriage and a proposal to better implement the partnership theory into elective share law using a deferred-community property scheme, see generally Newman, *supra* note 69. See also Gary, *Marital Partnership Theory*, *supra* note 70, at 588-89 (acknowledging that the Uniform Probate Code's elective share "facilitates planning and avoids wasting judicial resources on tracing problems and support suits" but criticizing that "the arbitrary nature" of the accrual approach allows for subjecting separate property to the elective share in certain cases, notably in the case of a late-in-life marriage that lasts fifteen or more years, and fails to subject marital property to the elective share in other cases, notably where the survivor's "independent wealth is greater than that of the marital estate"). Professor Gary proposes as an alternative that would better implement the marital partnership theory beginning by defining the elective share's augmented estate by reference to the decedent's gross estate for federal estate tax purposes, and then (1) subtracting out from the gross estate the value of the decedent's separate property "to the extent feasible" and using the federal estate tax code to help in identifying separate property, and (2) recapturing into the gross estate certain property including certain gifts made to others than the surviving spouse by the decedent within three years of the decedent's death, certain insurance proceeds paid as a result of the decedent's death, tort claims related to the decedent's death and payable to the surviving spouse not otherwise included within the de-

The reciprocity norm also may well be playing a role in many will contests.⁷⁹ Professor Melanie Leslie theorizes that judges and juries adjudicating will contests seek to vindicate a social norm of reciprocity—that family members who care for and support a close relative or otherwise are actively involved in the close family member's life can expect to receive an inheritance from the relative and can rely upon that expectation.⁸⁰ This reciprocity norm supports the expectation that a testator will disinherit her closest relatives in favor of a non-relative only where those relatives have failed to provide care for the testator and, instead, one or more non-relatives have performed the nurturing “family” roles that society expects family members to play.⁸¹ This reciprocity norm has the virtue of encouraging family members to support each other, albeit out of an expectation that the supporting family member herself will enjoy reciprocal support in the future.⁸²

Professor Leslie argues that the fact-finder in a will contest is likely to believe that a testator who has disinherited a close relative has broken an implied promise to the family member where the family member had acted in accordance with the reciprocity norm.⁸³ The fact-finder, therefore, will set aside the will that violates the reciprocity norm, thus allowing the family member to take a share of the decedent's intestate estate.⁸⁴ On the contrary,

dent's gross estate, and all marital property owned by or controlled by the surviving spouse. *Id.* at 589-603. Professor Gary seeks to leave the surviving spouse with one-half of the marital property by giving to the surviving spouse an elective share equal to fifty percent of the augmented estate minus offsets including marital property already owned by the surviving spouse, and property passing to the surviving spouse at the decedent's death. *Id.* at 603.

⁷⁹ See generally Leslie, *supra* note 65.

⁸⁰ *Id.* at 558-59.

⁸¹ *Id.* at 571.

⁸² *Id.* at 583.

⁸³ *Id.* at 586 (“Courts intuitively understand that the testator may have obtained benefits by implying a promise to reciprocate by leaving relatives a share in her estate.”).

⁸⁴ *Id.* at 558-59, 587, 590. Professor Leslie bases her conclusions on her examination of more than 160 will contest cases decided within a five-year period. *Id.* at 592. She concludes from her examination of these cases

that when a testator's will appears to fly in the face of the reciprocity norm, courts commonly honor that norm by invalidating the will, often by finding that the testator-beneficiary relationship was “confidential” and created a presumption of undue influence. . . . Conversely, when the court wishes to uphold the will, the court will view an intimate interdependent relationship between a testator and a will beneficiary as justifying the bequest, rather than giving rise to a presumption of invalidity.

in the case of a close relative who had failed to meet the testator's physical or emotional needs, the fact-finder will not find the testator guilty of a breach of any implied promise in disinheriting the relative in favor of a non-family member. In such a case, the fact-finder will uphold the will against the disappointed family member's challenge.⁸⁵

For the most part, however, American intestacy law does not recognize the value of reciprocity. As Professor Frances Foster has written, "[t]he U.S. inheritance system at best regards virtue as its own reward. Under inflexible status-based intestacy rules, contributions to the decedent's welfare are irrelevant for inheritance purposes."⁸⁶

Most American states, however, do recognize a principle of reverse reciprocity by which the intestacy scheme penalizes some persons who acted in a reprehensible manner toward the intestate such that the bad actor is deemed an "unworthy heir."⁸⁷ The most significant manifestation of this principle is the "slayer statute" which generally bars one who intentionally kills the intestate from taking her intestate property.⁸⁸ Indeed, such statutes

Id. Professor Leslie found that courts, including courts in jurisdictions that have adopted the substantial compliance or harmless error approaches to wills formalities, enforce compliance with the reciprocity norm also by holding wills that do not comport with the norm to have been defectively executed while excusing similar defects in wills that comport with the reciprocity norm. *Id.* at 604-08.

⁸⁵ *Id.* at 559, 587.

⁸⁶ Foster, *Linking Support and Inheritance*, *supra* note 65, at 1239. One can cite as counterexamples statutes that reward the decedent's caregivers, although reciprocity may not be the acknowledged value grounding the statute. For example, Illinois law allows for a court to direct the guardian of an estate of a mentally or physically disabled person to make a "conditional gift" to a spouse, parent or sibling of the disabled person who has lived with and cared for the disabled person for at least three years. 755 ILL. COMP. STAT. 5/11a-18.1(a) and (b) (West 1992). The gift may not be distributed until the death of the disabled person. *Id.* § 11a-18.1(b). The theory of the statute is that the disabled person would intend to make such a gift. *Id.* § 11a-18.1(a). Illinois also allows a disabled person's caregiver to assert a statutory claim against the estate of the disabled person if the caregiver was the decedent's spouse, parent, sibling or child. *Id.* § 18-1.1. The amount of the allowed claim will depend upon the nature and extent of the disabled person's disability. *Id.* § 18-1.1.

⁸⁷ *But see* Monopoli, *supra* note 12, at 273 ("The idea that wrongdoing of an heir should affect whether he takes his share is not common to American inheritance law.").

⁸⁸ *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 34.8, statutory note (1992) (listing statutes). *See also* Robin L. Preble, *Family Violence and Family Property: A Proposal for Reform*, 13 LAW & INEQ. 401, 421 (1995) (arguing that expansion of slayer statutes so that one who abused the decedent during the decedent's life would forfeit her rights in the decedent's estate would further the

generally apply not only to intestate property but also to property passing by will, revocable inter vivos trusts, life insurance policies, and joint tenancies.⁸⁹ Section 2-803 of the 1990 Uniform Probate Code, for example, provides that one who intentionally and feloniously kills the decedent forfeits any right to succeed to property passing by intestacy, will, or by a will substitute, such as a payable-on-death account or a joint tenancy.⁹⁰ The comment to section 2-803 explains that this slayer statute is meant to implement a principle of reverse reciprocity—the principle that “a wrongdoer may not profit by his or her own wrong.”⁹¹

Moreover, in a large number of American states, the law of intestacy recognizes this principle of reverse reciprocity with respect to behavior less severe than intentional homicide. In such states, unworthy heirs might include those who abandoned the intestate or who had a duty to support the intestate but failed to do so.⁹² In these states, the intestacy scheme bars such persons

decedent's likely donative intent and would “serve as a powerful example of society's collective resolve to condemn family violence”).

⁸⁹ Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489, 505-06 (1986) [hereinafter Fellows, *Slayer*].

⁹⁰ UNIF. PROBATE CODE § 1-201(19) (amended 1997) (definition of “governing instrument”); *id.* § 2-803(a)-(c).

⁹¹ UNIF. PROBATE CODE § 2-803, cmt. (amended 1997). *See also* Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803, 805-06 (1993) (“The rule . . . is often said to be a self-evident corollary of the venerable legal principle *nullus commodum capere potest de injuria sua propria*: no one may profit by his own wrongdoing.”); Fellows, *Slayer*, *supra* note 89, at 490 (“Relying on the equitable maxim that individuals should not profit from their own wrongful acts, courts and legislatures bar slayers from taking their victims' property or in any way benefitting economically from the premature death of their victims.”). *But see id.* at 490 (arguing that the slayer rule is “an essential element of the property transfer law system and does not rest solely on equity principles”). Slayer statutes can be seen also as promoting the likely donative intent of the decedent. It seems reasonable to impute to the slain decedent an intent to disinherit her slayer. Adam J. Hirsch, *Inheritance, Legal Contraptions, and the Problem of Doctrinal Change*, 79 OR. L. REV. 527, 540 (2000). *See also* Sherman, *supra*, at 858-74 (arguing that the slayer rule should not be applied in cases of mercy killing or assisted suicide because “the decedent would presumably be grateful to the heir or legatee for his actions”).

⁹² *See generally* Monopoli, *supra* note 12 (discussing inheritance law's treatment of parents who abandon or fail to support their child with respect to inheritance from the child); *id.* at 274 (discussing the law of a few states that bars intestate inheritance by a surviving spouse who had abandoned the decedent spouse); UNIF. PROBATE CODE § 2-114 (amended 1997) (providing that “[i]nheritance from or through a child by either natural parent or his [or her] kindred is precluded unless that natural parent has openly treated the child as his [or hers], and has not refused to support the child”); WAGGONER ET AL., FAMILY PROPERTY LAW, *supra* note 35, at 82 (noting that “courts may interpret physical and emotional abuse as constructive abandonment”). *See also* Kymberleigh N. Korpus, Note, *Extinguishing Inheri-*

from taking an intestate share.⁹³

Professor Foster has reported on the Chinese inheritance system and how it incorporates the value of reciprocity to a much greater extent than does the American system. Chinese law makes relevant a wide range of behaviors by the potential heir toward the decedent.⁹⁴ A Chinese court, like some American courts, might punish an unworthy heir for abandoning, mistreating, or failing to support the decedent.⁹⁵ Unlike American courts, however, a Chinese court might also explicitly reward one who had cared for the decedent's needs by awarding such a person a larger share of the intestate estate than she might otherwise have gotten.⁹⁶ Indeed, the court might so reward a person who is not legally related to the decedent and who otherwise would not have taken any of the decedent's intestate estate.⁹⁷

Chinese courts enjoy great flexibility with respect to the extent to which they may decrease the share of an unworthy heir or increase the share of one whose behavior toward the decedent merits reward.⁹⁸ The court might order total forfeiture of the

tance Rights: California Breaks New Ground in the Fight Against Elder Abuse But Fails to Build an Effective Foundation, 52 HASTINGS L.J. 537 (2001) (discussing section 259 of the California Probate Code which bars an abuser from taking from the decedent's estate property that was awarded to the decedent's estate as a result of liability arising from the abuse).

⁹³ Frances H. Foster, *Towards a Behavior-Based Model of Inheritance?: The Chinese Experiment*, 32 U.C. DAVIS L. REV. 77, 80 (1998) [hereinafter Foster, *Behavior-Based Model*]. See generally RESTATEMENT (THIRD) PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5(5) (providing that a parent who has abandoned a child should be barred from inheriting from or through the child); *id.*, at statutory notes 2, 14 (citing to statutes of twenty-three states that bar a parent, or in some statutes only a father, who has abandoned or refused to support his child from inheriting from the child); *id.* at Reporter's Note 9 (citing cases that have implemented this principle). See also UNIF. PROBATE CODE § 2-114(c) (amended 1997) (barring inheritance from or through a child by a natural parent or her kindred if the natural parent has failed to openly treat the child as hers or has refused to support the child); Rhodes, *supra* note 58, at 524-28, 532-36 (reviewing statutes that provide for forfeiture of an abandoning parent's share in her child's intestate estate and arguing for a functional interpretation of "parent" in other intestacy statutes that would exclude from taking a legal parent who had abandoned her minor child); Eleanor Mixon, Note, *Deadbeat Dads: Undeserving of the Right to Inherit from their Illegitimate Children and Undeserving of Equal Protection*, 34 GA. L. REV. 1773 (2000).

⁹⁴ Foster, *Behavior-Based Model*, *supra* note 93, at 81-86.

⁹⁵ *Id.*

⁹⁶ Foster, *Linking Support and Inheritance*, *supra* note 65, at 1239-41.

⁹⁷ *Id.* at 1242 ("Chinese courts routinely provide caregivers, regardless of blood or marital relationship to the decedent, preferential treatment in intestate succession.").

⁹⁸ See Foster, *Behavior-Based Model*, *supra* note 93, at 94-95 ("China's behavior-

person's share of the estate or merely a partial reduction to the extent that the court judges appropriate.⁹⁹ In contrast, those American courts that are authorized to punish unworthy heirs may do so only by ordering a total forfeiture. American courts do not have the authority to reduce an heir's share only in part as the court thinks is proportional to the severity of the heir's wrong-doing.¹⁰⁰

C. Reliance

A third goal of my proposed intestacy scheme reform is to protect the financial well-being of the committed partner who has arranged her life so that she has become dependent on the intestate for the maintenance of her standard of living.¹⁰¹ The reliance I seek to protect contains an element of sacrifice. I seek to protect the expectations of the surviving partner who has foregone opportunities or reallocated her resources in order to maintain the partnership or promote the common good of both partners.¹⁰²

My intestacy scheme's protection of this reliance interest recognizes that non-marital relationships are stronger when the partners take responsibility for one another, and when the partners are comfortable pooling their financial and human resources within the relationship should they find it beneficial to do so.¹⁰³

based model of inheritance gives courts an arsenal of remedies for penalizing misconduct by heirs.”).

⁹⁹ *Id.* at 84, 94-95.

¹⁰⁰ *Id.* at 84.

¹⁰¹ See John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 U. MIAMI L. REV. 497, 559 (1977) (“the provisions for passage of intestate property should be broadened to include as possible takers those dependent upon the decedent at the time of his death under circumstances which would lead to the expectation of continued support”); Gary, *Adapting Intestacy Law*, *supra* note 4, at 9 (citing as a frequently identified and “paramount” goal of intestacy schemes goals that “derive from a concern with support, both economic and otherwise, of the decedent’s family.”). *Id.* at 11 (“a goal of providing support for a decedent’s dependents is inextricably intertwined with [intestacy] provisions for the family”); Fellows et al., *Committed Partners*, *supra* note 14, at 12 (commenting that the societal acceptance that a surviving spouse should be entitled to a large portion of the decedent spouse’s intestate estate derives in part from “equity considerations of financial dependence [and] reliance”); *id.* at 8 (noting the relationship between intestacy statutes and societal concerns with “equity, meaning concerns about fairness and protection of reliance interests”).

¹⁰² This notion of reliance is not completely separable from the reciprocity value. It may be that a significant contribution to the couple’s aggregation of wealth was the assumption of opportunity costs in foregone career opportunities.

¹⁰³ See Ellman, *Divorce Rates*, *supra* note 1, at 40-41 (“Unmarried cohabitants

Where one partner has sacrificed opportunities for the good of the partnership, therefore, the intestacy scheme will acknowledge her sacrifice. This is so regardless of whether the decedent made any explicit promise to compensate the other partner for her sacrifice. Moreover, from a scarce resources perspective, it makes sense that the intestate partner's estate rather than the government's purse satisfy the survivor's reliance interest as it was the decedent partner who benefitted most directly from the surviving partner's sacrifice.

Protection of this type of reliance interest does not seem to be a central concern of succession law. The nearest examples of such concern arguably are found in the putative spouse doctrine and the equitable adoption doctrine. Even these doctrines, however, do not very nearly implement the principle of protection of reliance interests that I seek to incorporate into intestacy reform.

The putative spouse doctrine¹⁰⁴ allows a court to treat a survivor who was not legally married to a decedent as the decedent's legal spouse for purposes of the intestacy statute.¹⁰⁵ The survivor must have cohabited with the decedent in the good-faith belief that she was the decedent's legal spouse.¹⁰⁶ In this sense, the doctrine is concerned with reliance. The doctrine concerns itself with dependence also in that, when there is more than one putative spouse asserting a claim to the decedent's estate or where both a putative spouse and a legal spouse are asserting such claims, the court must equitably apportion the estate taking into account, among other factors, the comparative needs of the claimants.¹⁰⁷

are less likely than married couples to pool their financial resources, to have a sense of responsibility for one another, [and] to have the confidence in their relationship that allows for them to specialize within it.”).

¹⁰⁴ For an in-depth discussion of the putative spouse doctrine, see generally Christopher L. Blakesley, *The Putative Marriage Doctrine*, 60 TUL. L. REV. 1 (1985).

¹⁰⁵ *Id.* at 48.

¹⁰⁶ RESTATEMENT (THIRD) PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.2, cmt. e. See also UNIF. MARRIAGE AND DIVORCE ACT (1983) § 209; Blakesley, *supra* note 104, at 18-19 (“Good faith is the central element of the putative marriage doctrine and its common-law counterparts”, and “consists of being ‘ignorant of the cause which prevents the formation of the marriage or the defects in its celebration which caused its nullity.’”) (citation omitted).

¹⁰⁷ RESTATEMENT (THIRD) PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.2, cmt. e. A second factor that the court might consider in equitably apportioning the estate is the duration of a claimant's cohabitation with the decedent. *Id.* See also UNIFORM MARRIAGE AND DIVORCE ACT § 209 (1983) (providing that “the court shall apportion property, maintenance, and support rights among the claim-

Pursuant to the equitable adoption doctrine, a court may allow a surviving foster child of the decedent to inherit from the decedent's intestate estate.¹⁰⁸ Most courts require that the foster parent have entered into an adoption contract with the person or persons legally able to consent to the adoption and that the foster parent have failed to perform the contract even though she raised the foster child as her own.¹⁰⁹ Some courts that have applied the equitable adoption doctrine have justified its application on the grounds that the foster child detrimentally relied on the foster parent's promise to adopt, which detrimental reliance justifies the court's providing an equitable remedy for the child.¹¹⁰ For example, the Georgia Supreme Court, when it first recognized the doctrine of equitable adoption in Georgia in 1913, emphasized the reliance interests of the foster child:

Where one takes an infant into his home upon a promise to adopt such as his own child, and the child performs all the duties growing out of the substituted relationship of parent and child, rendering years of service, companionship, and obedience to the foster parent, upon the faith that such foster parent stands in loco parentis, and that upon his death the child will sustain the legal relationship to his estate of a natural child, there is equitable reason that the child may appeal to a court of equity to consummate, so far as it may be possible, the foster parent's omission of duty in the matter of formal adoption.¹¹¹

ants [including a legal spouse and one or more putative spouses] as appropriate in the circumstances and in the interests of justice").

¹⁰⁸ See generally Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711, 766-806 (1984) (presenting a thorough examination of the theoretical bases and application of the equitable adoption doctrine).

¹⁰⁹ WILLIAM M. MCGOVERN & SHELDON F. KURTZ, WILLS, TRUSTS AND ESTATES 98-99 (2d ed. 2001). See also RESTATEMENT (THIRD) PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5, cmt. k.

¹¹⁰ Hirsch, *supra* note 91, at 548 and n.75 (citing cases). Professor Adam Hirsch has concluded from his reading of the equitable adoption cases, however, that it is reasonable to infer that a court will apply the equitable adoption doctrine only when its doing so will effectuate the foster parent's likely donative intent. *Id.* at 548-49 n.76.

¹¹¹ Crawford v. Wilson, 139 Ga. 654, 660, [78 S.E. 30, 33 (quote incomplete)] (1913). See also O'Neal v. Wilkes, 439 S.E.2d 490, 493-94 (Ga. 1994) (Sears-Collins, J., dissenting) (emphasizing the child's reliance interests in equitable adoption cases and proposing that the court in equitable adoption cases not concern itself with the "fiction of whether there has been a contract to adopt" but rather focus on "the relationship between the adopting parents and the child and in particular whether the adopting parents have led the child to believe that he or she is a legally adopted member of their family").

Protection of dependence without express regard to reliance or sacrifice is more easily found in succession law than is the protection of reliance interests on which I wish for my intestacy reform to focus.¹¹² Again, foreign models provide an illustration of how American succession law might offer greater protection for those who depended financially upon the decedent.¹¹³ Family maintenance schemes, such as those in the United Kingdom, New Zealand, Australia, and Canada, allow a court to disregard a decedent's estate plan and distribute part of the decedent's estate to an applicant, often limited to a spouse or child, who was dependent upon the decedent at her death.¹¹⁴

For example, the United Kingdom's Inheritance Act of 1975¹¹⁵ allows a court to make an award from the decedent's testate or intestate estate in favor of an applicant when the court determines that the decedent's will or the intestacy scheme, or the combination of the two, "is not such as to make reasonable financial provision for the applicant."¹¹⁶ Under the statute, the decedent's surviving spouse or child, the decedent's former spouse who has not remarried, any person who the decedent treated as a child of the family in relation to a marriage of the decedent, and "any person . . . who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased" may apply for provision.¹¹⁷ In the case of an application

¹¹² But see Gaubatz, *supra* note 101, at 533 (noting that intestacy law generally fails to distinguish between heirs of "unequal capacity" so as to provide extra protection to the decedent's dependents who are infirm or disabled).

¹¹³ See, e.g., Ronald Chester, *Should American Children Be Protected Against Disinheritance?*, 32 REAL PROP. PROB. & TR. J. 405 (1997) (arguing for adoption in the United States of a family maintenance scheme to protect children along the lines of the scheme utilized in British Columbia).

¹¹⁴ See Foster, *Linking Support and Inheritance*, *supra* note 65, at 1211; Gary, *Adapting Intestacy Laws*, *supra* note 4, at 11 ("This goal of providing for dependents is a driving concern behind the system of testator's family maintenance in force in Australia, Canada, England and New Zealand."). See also W.D. MACDONALD, *FRAUD ON THE WIDOW'S SHARE* (1960) (arguing for replacement of the elective share with a "decedent's family maintenance" scheme which would authorize a court to order an award from the decedent's estate to meet the reasonable support needs of the decedent's family members). The family maintenance systems apply to testate as well as intestate estates and allow a court to some extent to rewrite a decedent's will. In this respect, such systems go well beyond the reform of intestacy law that I advocate in this Article.

¹¹⁵ (United Kingdom) Inheritance (Provision for Family and Dependents) Act 1975, c.63 (Eng.) (as amended by the Family Law Act 1996).

¹¹⁶ *Id.* § 2(1).

¹¹⁷ *Id.* § 1(1)(e). The statute provides that a person was being maintained by the decedent when the decedent "otherwise than for full valuable consideration, was

by a surviving spouse, the court is to decide the question of "reasonable financial provision . . . whether or not that provision is required for his or her maintenance."¹¹⁸ Otherwise, the court is to interpret "reasonable financial provision" to mean an amount that "would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance."¹¹⁹ The act does not expressly mention reliance or sacrifice as factors that the court should consider in determining whether to make an award to an applicant. The act does list among factors that the court should consider, however, the decedent's obligations and responsibilities toward the applicant, other applicants, and the beneficiaries of the decedent's estate; the competing financial needs and resources of the applicant, other applicants, and the beneficiaries of the decedent's estate; the physical or mental disabilities of the applicant, other applicants, and the beneficiaries of the decedent's estate; and the conduct of the applicant or any other person.¹²⁰

China's inheritance law makes a priority the protection of the financial interests of the decedent's dependents.¹²¹ The Chinese system promotes this goal through use of forced heirship and equitable redistribution.¹²² Chinese courts have discretion to distribute an intestate's estate among her dependents as the court thinks best will meet the particular needs of those dependents.¹²³ For example, Chinese courts might provide a disproportionate share of the intestate's estate to a child of the intestate with a disability that affects her ability to earn a living,¹²⁴ and might provide a share of the estate to a person otherwise lacking a legal family relationship with the intestate but for whom the intestate had provided financial support.¹²⁵

making a substantial contribution in money or money's worth towards the reasonable needs of that person." *Id.* § 1(3).

¹¹⁸ *Id.* § 1(2)(a).

¹¹⁹ *Id.* § 1(2)(b).

¹²⁰ *Id.* § 3(1).

¹²¹ Foster, *Linking Support and Inheritance*, *supra* note 65, at 1217 ("China recognizes 'dependence as the gravamen of inheritance.' Support, not entitlement, is the principal basis of Chinese inheritance law.").

¹²² *Id.*

¹²³ *Id.* at 1224, 1232.

¹²⁴ *Id.* at 1231.

¹²⁵ *Id.* at 1237-38 ("In practice, Chinese courts have found support relationships in a variety of contexts to include rearing and education of children, long-term cohabitation with the decedent, physical and emotional care, and even purely financial assistance."). Chinese courts will award not only intestate property to ensure sup-

American succession law provides limited protection for a decedent's dependents in the form of a family allowance,¹²⁶ an exempt property allowance,¹²⁷ and a homestead allowance.¹²⁸ The Uniform Probate Code also provides a surviving spouse with a "supplemental elective-share amount" intended to ensure at least a minimum level of support for a surviving spouse with actual need who has been disinherited by the decedent spouse.¹²⁹ This provision of the Uniform Probate Code's elective share scheme is grounded on the notion "that the spouses' mutual duties of support during their joint lifetimes should be continued in some form after death in favor of the survivor, as a claim on the decedent's estate."¹³⁰

None of these doctrines has at its heart, however, a concern with dependence or reliance relating to sacrifice of opportunities or allocation of resources. This type of reliance interest, which I seek to protect in my intestacy reform, is more nearly found in recent proposed family law reform. The American Law Institute's Principles of the Law of Family Dissolution ground the recharacterization of certain separate property as marital property on just this type of reliance. I discuss this proposed family law reform and its justification below in my justification of the accrual approach to calculation of an intestate share.¹³¹

port of those dependent on the intestate during her life, but also will award property that would have passed otherwise pursuant to the decedent's will to ensure protection of dependents. *Id.* at 1249. In contrast, where dependency is not an issue, Chinese courts are reluctant to disregard the decedent's will to reward acts of care toward the decedent by a claimant. *Id.*

¹²⁶ A family allowance generally provides for a reasonable but limited amount of maintenance to be paid to a decedent's surviving spouse or dependent children during the administration of the decedent's estate, but often not to exceed a maximum period of time. *See, e.g.,* UNIF. PROBATE CODE § 2-404 (amended 1997).

¹²⁷ An exempt property allowance protects certain property—commonly household furniture, furnishings, automobiles, and appliances—up to a specified maximum total value from the claims of creditors. *See, e.g., id.* § 2-403.

¹²⁸ A homestead allowance typically gives to a decedent's surviving spouse and minor children the right to occupy the decedent's home for a specified period of time, often of lengthy duration. Many homestead statutes are of limited utility in that they set a low monetary ceiling for protection of property. RESTATEMENT (THIRD) PROP: WILLS AND OTHER DONATIVE TRANSFERS § 1.1, cmt. j (1999).

¹²⁹ *See* UNIF. PROBATE CODE § 2-202(b) (amended 1997).

¹³⁰ UNIF. PROBATE CODE Part 2 (Elective Share of Surviving Spouse), general cmt. (amended 1997).

¹³¹ *See infra* notes 147-74 and accompanying text.

D. Certainty and Ease of Administration

One can envision various schemes for the distribution of intestate property that focus on honoring the donative intent of the decedent while also seeking to reward those individuals who had most significantly contributed to the intestate's financial, physical, or psychological well-being; and while also attempting to protect the reliance interests of those persons who had reordered their lives so as to have become dependent upon the decedent for their financial comfort. Under one such system, with respect to each person who dies intestate, a probate judge would engage in an open-ended inquiry into the particular circumstances of the intestate's life.¹³² The court would hear testimony and find facts relating to the intestate's probable donative intent—that is, relating to the issue of which persons this intestate most likely would have wanted to inherit her intestate estate.¹³³ Also, the court would seek to determine whether any individuals were particularly instrumental in contributing to the intestate's well-being—whether it be the accumulation of her wealth or the maintenance of her health and happiness. Finally, the court would inquire into whether any persons had sacrificed opportunities or reallocated their resources in reliance upon their relationship with the decedent and, as a result thereof, become dependent upon the intestate for their financial support. At the conclusion of its investigation into these matters, the court would then order distribution of the decedent's intestate property to such persons and in such portions as the court had concluded would best balance the three values grounding the intestacy statute.

Such a scheme has a critical short-coming. Administration of an intestate estate under an open-ended inquiry intestacy scheme would produce great uncertainty, would be more time-consum-

¹³² See Gaubatz, *supra* note 101, at 557 (proposing that to better carry out the goal of protecting the decedent's family one might "devise a system through which investigation into each case determines the kind and amount of protection that each family needs"). Gaubatz argues that:

Such an investigation would permit the law to deal with the exigencies of the particular situation; it would avoid the existing practice of arbitrarily setting family members' interests and levels of protection; and it would avoid the risk that the individual family will not fit within the arbitrary prototype adopted by the legislature.

Id.

¹³³ See *id.* at 559-60 (proposing that a court be given discretion to adjust intestate shares to "provide for the reasonable expectations or probable desires of the decedent").

ing, and would be greatly more expensive than is administration under extant American intestacy schemes.¹³⁴ Certainty and ease of administration are prized features of these extant intestacy schemes.¹³⁵ More generally, certainty and ease of administration are principal concerns of American succession law.¹³⁶

¹³⁴ See Monopoli, *supra* note 12, at 261 (noting that increased litigation would be one cost of barring intestate taking by fathers who failed to support the decedent child); Jaki K. Samuelson & Dennis Thorson, Comment (Contemporary Studies Project), *A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes*, 63 IOWA L. REV. 1041, 1122 (1978) ("The major objection to an implementation of a flexible intestate succession option is the expected increase in costs, including administration time, additional court personnel, and lawyers fees.").

¹³⁵ Tanya K. Hernandez, *The Property of Death*, 60 U. PITT. L. REV. 971, 1016 (1999) ("Intestate statutes preserve judicial economy by setting forth a predefined hierarchy of persons who qualify for distribution. Disregarding the hierarchy to inquire into a decedent's own definition of family in the absence of a will would result in lengthier proceedings."). See also Monopoli, *supra* note 12, at 292-96 (noting the increase in uncertainty and expense that would arise if probate courts are given discretion to deny a parent an intestate share of his child's estate because of the parent's abandonment or non-support of the child and proposing that such costs could be minimized by requiring the probate judge to give deference to a family court's ruling during the child's life that the parent had abandoned or failed to support the child).

¹³⁶ See, e.g., Gaubatz, *supra* note 101, at 515 ("Simplicity in the administration of estates is an important goal both to society and to its members."); Waggoner, *Spousal Rights in Our Multiple-Marriage Society*, *supra* note 2, at 726-28 (explaining that the drafters of the 1990 Uniform Probate Code rejected equitable distribution as the basis of the Code's revised elective share, in part, because of the uncertainty and difficulty in administration that such an approach would introduce into the forced share process); Mary Louise Fellows, *Traveling the Road of Probate Reform: Finding the Way to Your Will (A Response to Professor Ascher)*, 77 MINN. L. REV. 659, 660 (1993) (noting that the reduction of litigation and the facilitation of estate planning are primary goals of probate reform).

Arguably, a prime example of the infrequent subordination of certainty in succession law in favor of a second value is the "harmless error" principle with respect to the execution of a will. See UNIF. PROBATE CODE § 2-503 (amended 1997). This principle provides that a court may give a document effect as a will even though the document is not executed in compliance with the jurisdiction's requirements for the execution of a will, provided that the proponent establishes by clear and convincing evidence that the decedent intended for the document to be her will. *Id.* The principle grants this discretion to the court in order to avoid "intent-defeating outcomes in cases of harmless error." UNIF. PROBATE CODE § 2-503 cmt. (amended 1997). Professor Foster has commented with respect to the harmless error principle that "[i]nterestingly, many of the very scholars who insist on fixed rules in the support context favor discretionary schemes in the case of will execution defects." Foster, *Linking Support and Inheritance*, *supra* note 65, at 1204 n.25. But see RESTATEMENT (THIRD) PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3, Reporter's Note 2 (setting out an argument that "[t]he harmless error rule does not increase litigation"); Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1193-94 (1986). Glendon recon-

Indeed, while Professor Foster lauds the Chinese system for its flexibility and its ability to pay attention to the merits of the individual claims of the decedent's friends and family, she acknowledges that such a system might be unworkable in the United States and might even fail in China as that nation develops.

If current trends [in China] continue, increased social mobility, accumulation of private property, and a rise in the popular use of courts will bring about an increase in the number and complexity of inheritance disputes. In its present form, the behavior-based model appears fundamentally unsuited to this new environment. It is highly time- and labor-intensive, requiring courts to evaluate on a case-by-case basis the conduct of all potential claimants and the most appropriate division of each estate. The flexibility that is the hallmark of the behavior-based model today may prove to be its greatest drawback in the future.¹³⁷

Therefore, any proposal to reform intestacy law to provide for a decedent's surviving non-marital committed partner that utilizes a multi-factor approach to the qualification of that partner must overcome opposition from those who are concerned about reform undermining certainty and ease of administration in probate.¹³⁸ It is a principal challenge for succession law in this

ciles her opposition to a discretionary family maintenance scheme and her support for a wills' formalities harmless error principle:

Discretion of the type advocated by [proponents of the harmless error principle] is at the margins of a fixed rule and is designed to soften the rule's effects in individual cases where its application could not serve either the purposes of the testator or the overall purposes of inheritance law. A major reason for disquiet about family provision legislation—that it is likely to breed litigation—does not appear to be present in the case of grants of discretion to dispense with Wills Act compliance.

Id.

¹³⁷ Foster, *Behavior-Based Model*, *supra* note 93, at 84-85. *See also id.* at 126 (pointing out that China's behavior-based inheritance model developed in an environment quite different from the environment in the United States, and questioning whether such a model could succeed in the United States). Another criticism that might be made of any system which gives a court open-ended discretion to rewrite a decedent's estate plan is that such a system carries a greater risk to the testamentary freedom of those living in non-dominant family structures in that the court is more likely to devalue their family relationships.

¹³⁸ *See generally* Glendon, *supra* note 136, at 1186 (expressing uneasiness about succession law reform that would give discretion to a judge to rearrange the decedent's estate plan "according to a judge's own notion of what is reasonable"). *See also* Rhodes, *supra* note 58, at 528 (anticipating the objection based on certainty to her proposed reform of intestacy law to exclude inheritance by parents who abandon their minor child and arguing that a concern for certainty should not preclude reform given that (1) her reform would apply only to egregious cases and (2) her

era of the emergence of the legal movement to recognize functional family¹³⁹ to balance a concern with certainty and ease of administration with the desire for succession law to better serve the needs of property owners who have formed less dominant family structures.¹⁴⁰ This balancing must resist the temptation to

reform would place the burden of demonstrating abandonment by clear and convincing evidence on those asserting abandonment); Hernandez, *supra* note 135, at 1016 (“The resistance to incorporating an expanded definition of family into probate codes may stem from a concern with not wanting to overwhelm the probate system with open-ended inquiries into who can be considered family.”). Professor Hernandez has argued that recognizing functional families in the context of burial instructions might be a good first reform that would give courts experience in the exercise of adjudicating who is family with relatively little cost. *Id.* at 1018 (“The context of challenges over burial instructions should be a manageable context in which to respect a testator’s own definition of family because it can be divorced from probate court concerns over a testator recognizing his or her financial support obligations to minor children and spouses.”).

In crafting his Working Draft, Professor Waggoner set out to draft a multi-factor intestacy statute that would be flexible enough to recognize deserving partners while not excessively undermining certainty. Waggoner, *Marital Property Rights*, *supra* note 18, at 78 (stating that the author’s goal is to devise an approach that will “minimize case-by-case adjudication by opening up more efficient, bright-line tests into which most plaintiffs with just claims could fit rather automatically”).

¹³⁹ Professor Tanya Hernandez has described the emergence of the legal movement to recognize functional family:

Social custom is developing a concept of family as those “people who love each other and want to work to support each other” because they simply choose to, or because the need for a caretaker of the elderly, ill, disabled and other dependents has prompted the formation of a family. In response, the legal system has begun to employ a “functional approach” to defining family. The functional approach legitimizes non-nuclear relationships that share the essential qualities of traditional relationships for a given context by inquiring whether a relationship shares the main characteristics of caring, commitment, economic cooperation and participation in domestic responsibilities. The paradigm of the functional family seeks to give individuals greater control over the structure of their family lives to recognize that biology is not family.

Hernandez, *supra* note 135, at 1006-07. See also Note, *Looking for a Family Resemblance*, *supra* note 16, at 1646 (“Instead of focusing on the identities and formal attributes of the individuals within a relationship, the functional approach inquires whether a relationship shares the essential characteristics of a traditionally accepted relationship and fulfills the same human needs.”).

¹⁴⁰ See Glendon, *supra* note 136, at 1166 (“In most cases, what is required is not actually a choice [between establishing a fixed rule and delegating discretion to a judge], but rather a search for the proper mix of discretion and fixed rules under each set of circumstances—the optimum degree of fine-tuning without losing coherence and predictability, of reasonable certainty without losing flexibility.”). See also Gaubatz, *supra* note 101, at 556 (criticizing succession law for “postulat[ing] a mythical ‘normal’ family situation and tailor[ing] the law to fit this norm,” which practice, in “many common fact patterns where the decedent and his family do not fit the normal family model” results in “law [that] is at best inadequate and at worst un-

focus solely on the potential for succession law reform to undermine certainty and ease of administration.¹⁴¹ Rather, this balancing also must give weight to the benefits of discretion in succession law that may be sacrificed to certainty.¹⁴² Chief among these benefits is the ability of a discretionary system to recognize the importance of functional families in ways that a fixed-rule system cannot.¹⁴³

just”); Hernandez, *supra* note 135, at 981, 1004 (calling for courts and the law of wills to recognize the expanding definition of family).

¹⁴¹ See Gaubatz, *supra* note 101, at 534-35 (questioning “whether ease of administration and reduction of conflict provide sufficient justification” for intestacy statutes that fail to foster strong social units, fail to protect functional family members and undermine respect for the law).

¹⁴² Repeatedly, advocates of discretion in succession law have urged scholars to focus on the costs that accompany certainty. See generally Gaubatz, *supra* note 101 (calling for greater flexibility in the administration of decedents’ estates to better recognize and serve social bonds, merit and need). See also, e.g., Hernandez, *supra* note 135, at 1016-17.

[T]he doctrinal concern with ensuring predictability and judicial economy in the probate of estates is one which is being valued at the expense of undermining the stability of a testator’s family of choice in contravention of the role of inheritance to make succession more meaningful, valuable and responsive to the needs and circumstances of a particular family.

Id. (internal quotes omitted); Foster, *Linking Support and Inheritance*, *supra* note 65, at 1204-05 (urging succession law scholars who evaluate fixed rules v. discretionary inheritance systems “to consider the impact of fixed rules on people”); Gary, *Adapting Intestacy Laws*, *supra* note 4, at 57 (recognizing that the desire for certainty in succession law makes it difficult to reform intestacy statutes to take into account functional families, and arguing that “[t]he difficulty of creating a scheme of intestate distribution in the face of the multitude of family combinations cannot be underestimated, yet neither can the need to change an intestate system that increasingly fails to make sense in view of the ways families live”); *id.* at 71 (“Any determination of whether a decedent had a parent-child relationship with a survivor will require some degree of discretion [and] likely will lead to increased litigation . . . but given the state of today’s families, some degree of discretion is necessary.”); Newman, *supra* note 69, at 549-50 (conceding that adoption of a deferred-community-property approach to the elective share would undermine the succession law goals of predictability and ease of administration but urging such adoption in order to better implement the marital partnership theory); Mahoney, *supra* note 4, at 938 (arguing that the “limited amount of uncertainty generated by” her proposed reform that would bring step-children within the intestacy scheme where decedent stood in loco parentis with respect to the step-child “would be a fair price to pay for the just recognition of stepfamily rights”); Chester, *supra* note 113, at 416, 425 (stating that “justice is more important than certainty” in discussing British Columbia’s Wills Variation Act, which allows a court to order an “adequate, just and equitable” provision from the decedent’s estate for a spouse or child of the decedent).

¹⁴³ See generally Gary, *Adapting Intestacy Laws*, *supra* note 4. Professor Gary has proposed a model intestacy statute which incorporates a functional approach to defining the parent-child relationship alongside the existing definitions of parent and child derived from a legal relationship. She argues that such reform of the dominant fixed-rule (“blood, marriage or adoption”) approach is needed because the objective

Extant American succession law remains largely fixated on the nuclear family and on fixed rules that derive from and serve the nuclear family at the expense of less dominant family structures.¹⁴⁴ Arguments grounded in certainty continue to block reforms that would recognize and better serve these less dominant family structures.¹⁴⁵ One should anticipate that arguments from certainty also will be at the forefront of opposition to discretionary inheritance systems that would incorporate the values of reciprocity and reliance.¹⁴⁶

Certainty and ease of administration, therefore, are central concerns of my proposed intestacy reform. I seek to promote the donative intent of the intestate, recognize the contributions of the surviving partner to the intestate's estate and welfare, and protect the reliance interests of the surviving partner—all while retaining a great degree of administrative convenience. I attempt to balance these goals principally by means of an accrual and discounting scheme that I set out below.

III

THE PORTION OF THE INTESTATE ESTATE THAT SHOULD BE AWARDED TO A SURVIVING COMMITTED PARTNER

Ideally, the surviving committed partner should take from the decedent's intestate estate in proportion to the extent that the intestate would want her to take and in proportion to her reli-

approach too often fails to carry out the intestate's intent and too often leaves the intestate's functional and true family without support. *Id.* at 71-72.

¹⁴⁴ Gaubatz, *supra* note 101, at 534-35 (discussing the "insufficient coverage" of intestacy statutes that fail to recognize the "family of orientation (non-blood individuals with whom there are very close relationships)").

¹⁴⁵ See Foster, *Linking Support and Inheritance*, *supra* note 65, at 1255-56 (decrying the dominance of "[c]ertainty and administrative convenience arguments" in favor of fixed rules focused on the nuclear family and against reforms that would promote equitable inheritance mechanisms, and calling the human cost of such dominance "tremendous"); Gary, *Marital Partnership Theory*, *supra* note 70, at 581 (noting the concern that a testator's family maintenance scheme that would allow a court to disregard the testator's will to the extent the court deems it necessary to provide for the testator's dependents would lead to increased litigation and would introduce greater uncertainty into the estate planning process).

¹⁴⁶ Foster, *Linking Support and Inheritance*, *supra* note 65, at 1215, 1255-56 (citing to critics of family maintenance systems who rely on certainty and administrative convenience arguments); Gary, *Adapting Intestacy Laws*, *supra* note 4, at 69 (theorizing that a family maintenance system such as that in England has not caught on in the United States "perhaps because of a desire for certainty and perhaps due to the structure of the probate court system").

ance and reciprocity interests. A first limitation on this ideal is the need to avoid an open-ended inquiry in each case of intestacy in which a claimant seeks recognition as the surviving committed partner. A second limitation on this ideal is the fact that in certain circumstances, most notably when a partnership has fractured shortly before the intestate's death, the intestate's most likely donative intent will be at odds with the survivor's reciprocity and reliance interests. A scheme in which the committed partner's entitlement to a share of her partner's intestate estate accrues as the duration of the cohabiting partnership increases and is discounted in relation to the duration of the period between fracture of the partnership and the death of the intestate best implements the ideal.

A. The Accrual Approach

As a general rule, American intestacy schemes ignore the duration of a marriage in calculating the portion of a decedent spouse's intestate estate to be awarded to a surviving spouse.¹⁴⁷ Professor Waggoner's Working Draft similarly employs such an all-or-nothing approach. Under the Working Draft, once a person qualifies as a committed partner, the duration of the partnership will not affect the size of the share that the survivor takes.

In contrast, a central feature of my proposed intestacy scheme reform is an accrual approach to calculating the portion of the intestate estate to which the surviving committed partner shall be entitled. Pursuant to this accrual approach, the portion of the decedent partner's intestate estate to which the person who qualifies as a surviving committed partner shall be entitled is influenced by the duration of the cohabiting partnership. All else being equal, as the length of the cohabiting partnership increases, the size of the intestate share to which the surviving partner shall be entitled increases also.¹⁴⁸

¹⁴⁷ Cf. Inheritance (Provision for Family and Dependants) Act 1975, c.63 (as amended by the Family Law Act 1996) (Eng.) §§ 3(2) & (4) (listing among factors that a court should consider, in determining whether the disposition of a decedent's estate makes reasonable financial provisions for an applicant of court-ordered provision, (1) the duration of the decedent's marriage to a surviving spouse or a former spouse who has not remarried, and (2) the length of time that the decedent assumed financial responsibility for the maintenance of an applicant who the decedent was maintaining at her death).

¹⁴⁸ If the decedent and the surviving partner cohabited in a partnership for more than one period during the decedent's life, interrupted by a period of separation, all periods of cohabiting partnership should be added together to compute the total

I propose to give to a surviving committed partner a portion of the decedent partner's intestate estate according to the following schedule:

If the decedent and the surviving committed partner cohabited in a partnership <i>for a period of</i> :	The unreduced intestate share percentage is:
at least 3 years but less than 4 years	18% of the intestate estate
at least 4 years but less than 5 years	24% of the intestate estate
at least 5 years but less than 6 years	30% of the intestate estate
at least 6 years but less than 7 years	36% of the intestate estate
at least 7 years but less than 8 years	42% of the intestate estate
at least 8 years but less than 9 years	48% of the intestate estate
at least 9 years but less than 10 years	54% of the intestate estate
at least 10 years but less than 11 years	60% of the intestate estate
at least 11 years but less than 12 years	68% of the intestate estate
at least 12 years but less than 13 years	76% of the intestate estate
at least 13 years but less than 14 years	84% of the intestate estate
at least 14 years but less than 15 years	92% of the intestate estate
at least 15 years or more	100% of the intestate estate. ¹⁴⁹

A jurisdiction adopting my proposed intestacy scheme recognizing committed partners would need to integrate my proposal into its extant intestacy scheme so that the persons who would have taken the decedent's intestate estate had she died without a surviving committed partner would take that portion of the intestate estate that does not go to the surviving committed partner. For example, where the accrual schedule provides that the surviving committed partner shall be entitled to an unreduced intestate share percentage of eighteen percent of the intestate estate (because the decedent and the surviving committed partner cohabited in a partnership for a period of at least three years but less than four years), the decedent's remaining intestate heirs

cohabiting partnership period. Periods of separation should not be credited in computing the total cohabiting partnership period. *See* UNIF. PROBATE CODE § 2-202 cmt. (amended 1997) (stating that in computing the duration of a marriage for purposes of the elective share calculation, where spouses were married to each other more than once, all periods of marriage should be added together, but the periods of separation should be excluded).

¹⁴⁹ This grant of 100% of the intestate estate to the surviving committed partner in the case of a long-term partnership is in stark contrast to the Working Draft's award to a similarly-situated surviving committed partner. Even in the case of a thirty- or forty-year partnership, and even where the decedent is not survived by any descendant or parent, the Working Draft would provide to the surviving committed partner no more than \$50,000 plus one-half the balance of the intestate estate. *See infra* Appendix A § (a)(1).

would take at least the remaining eighty-two percent of the intestate estate. These non-partner heirs will take a greater portion of the intestate estate in cases in which the surviving committed partner's unreduced intestate share percentage is reduced.

My proposal provides that the "unreduced intestate share percentage" set forth in the accrual schedule is to be reduced if one or two of the following three circumstances exists at the decedent's death: (1) the decedent is survived by one or more descendants who are not also descendants of the surviving committed partner, (2) the decedent is not survived by any descendant but is survived by at least one parent, and (3) the partnership between the decedent and the surviving committed partner fractured prior to the decedent's death and remained fractured at the time of the decedent's death.¹⁵⁰ The amount of the reduction varies with the circumstance and is set out in Appendix B.¹⁵¹ Thus, where the decedent is survived by a committed partner entitled to an unreduced intestate share percentage of eighteen percent of the intestate estate, and in addition is survived by a child who is not also a child of the surviving committed partner, the child would be entitled to the remaining eighty-two percent of the intestate estate plus the portion of the unreduced intestate share percentage that is taken away from the surviving committed partner because the decedent was survived also by such a child. The theory of this particular discounting provision is that the decedent would want the surviving committed partner to take less of the intestate estate where the other surviving heir is such a child (as opposed to where, for example, the other surviving heir is a sibling of the decedent).

I derive the intestacy accrual schedule from the elective-share percentage schedule found in the Uniform Probate Code's elective share provisions. In general, my proposed unreduced intestate share percentage is twice the elective share percentage.¹⁵²

¹⁵⁰ See *infra* Appendix B § (a)(2)-(4). My proposal's treatment of this third circumstance—the partnership between the decedent and the surviving committed partner fractured prior to the decedent's death and remained fractured at the time of the decedent's death—is discussed in detail *infra* at notes 175-91 and accompanying text.

¹⁵¹ See *infra* Appendix B § (a)(2)-(4).

¹⁵² For cohabiting partnerships of less than three years in duration, my intestacy scheme does not give any portion of the intestate estate to the surviving partner. The Uniform Probate Code's elective share schedule does entitle the surviving spouse from a marriage of less than three years in duration to assert a claim for a portion of the decedent spouse's estate. See UNIF. PROBATE CODE §§ 2-202(a) &

This doubling of the elective share percentage is intended to award to the surviving committed partner a percentage of the intestate estate that approximates the percentage of the intestate estate that is partnership property. This award of all of the intestate partnership property to the surviving partner is intended to reflect not only the portion that is a return on the survivor's contribution to the partnership property titled in the decedent's name, but also an additional portion to protect the survivor's reliance interests and to reflect the decedent's likely intent to provide generously for her surviving partner.

The Uniform Probate Code's elective share calculation seeks to entitle the surviving spouse to one-half of the marital property from the union. Thus, the elective share fraction represents the drafter's estimate of the percentage of property that is one-half of the marital property for a relationship of any given duration.¹⁵³ To calculate the total percentage of property that is marital property, one must double the elective-share percentage. Therefore, to award all of the intestate partnership property to the surviving committed partner, my intestacy accrual schedule doubles the elective-share percentage.

The Uniform Probate Code's elective share calculation seeks to prevent a surviving spouse from asserting a claim to an elective share when the surviving spouse already owns half or more of the marital property from the union.¹⁵⁴ To do this, the elective share percentage is first applied against an augmented estate, which consists generally of all of the property owned by either

(b) (amended 1997). For an explanation as to why my intestacy scheme excludes surviving partners of relationships of less than three years in duration, *see infra* notes 211-39 and accompanying text.

¹⁵³ See UNIF. PROBATE CODE, part 2 (Elective Share of Surviving Spouse), general cmt. (amended 1997) (stating that "[b]y approximation, the redesigned system equates the elective-share percentage of the couple's combined assets with 50% of the couple's marital assets—assets subject to equalization under the partnership/marital-sharing theory").

¹⁵⁴ See *id.* The general comment to part 2 of the Uniform Probate Code states that the intended effect of the elective share calculation in the case of a long-term marriage

is to increase the entitlement of the surviving spouse when the marital assets were disproportionately titled in the decedent's name; and to decrease or even eliminate the entitlement of the surviving spouse when the marital assets were more or less equally titled or disproportionately titled in the surviving spouse's name.

Id.

spouse at the decedent's death.¹⁵⁵ Next, the product of this calculation is reduced by the survivor's credits, which include an approximation of all marital property already owned by the surviving spouse.

Consider a simple example: Assume a decedent who died after ten years of marriage. At her death, the decedent owned \$200,000 worth of property. The surviving spouse owned \$400,000 worth of property titled in his name. No property passed to the surviving spouse at the decedent spouse's death by means of intestacy, will or non-probate vehicle.

The Uniform Probate Code's elective-share percentage for a ten-year marriage is thirty percent of the augmented estate. The augmented estate in this simple example is valued at \$600,000. Thus, the elective share amount in this example is \$180,000. This represents an approximation of the amount of marital property to which the survivor is entitled.

The Uniform Probate Code's elective share calculation subtracts from this \$180,000 an approximation of the amount of marital property that the survivor already owns. To calculate the approximation of the amount of marital property that the survivor already owns, one multiplies the amount of property that the survivor already owns—here, \$400,000—times twice the elective share percentage—here, sixty percent.¹⁵⁶ Pursuant to this calculation, the survivor in this example is charged with owning \$240,000 of marital property, which is more marital property than that to which he is entitled. Therefore, the final amount from the decedent spouse's estate to which the surviving spouse in this ex-

¹⁵⁵ See UNIF. PROBATE CODE § 2-204 (amended 1997) (including within the augmented estate the value of the decedent's net probate estate); *id.* § 2-205 (including within the augmented estate the value of the decedent's non-probate transfers to others than the surviving spouse); *id.* § 2-206 (including within the augmented estate the value of the decedent's non-probate transfers to the surviving spouse); *id.* § 2-207 (including within the augmented estate the value of the surviving spouse's net assets at the decedent's death and, in addition, property that would have been included within the augmented estate under § 2-205 had the surviving spouse died at the decedent's death rather than the decedent). See also UNIF. PROBATE CODE Part 2 (Elective Share of Surviving Spouse), general cmt. (amended 1997) (stating that the elective share percentage is applied to the augmented estate to yield the elective share amount to which the surviving spouse is entitled because "[i]f the elective-share percentage were to be applied only to the decedent's assets, a surviving spouse who has already been overcompensated in terms of the way the couple's marital assets have been nominally titled would receive a further windfall under the elective-share system").

¹⁵⁶ See UNIF. PROBATE CODE § 2-209(a)(2) (amended 1997).

ample is entitled pursuant to the elective share is zero.¹⁵⁷

My intestacy scheme calculation differs from the Uniform Probate Code's elective share calculation in that it is not concerned with the amount of partnership property that the surviving committed partner already owns. This difference derives from the theories underlying my intestacy scheme as contrasted with the theory underlying the Uniform Probate Code's elective share. The elective share operates even in the face of the decedent's expressed and unequivocal contrary intent. An elective share award represents the amount to which a surviving spouse is entitled in the face of the decedent spouse's express disinheritance of the surviving spouse (by will or will substitute). Therefore, the Uniform Probate Code's elective share calculation guards against "overcompensating" the survivor in whose name a disproportionate share of the marital property already is titled.

The accrual intestacy calculation, in contrast, operates in the absence of such an express disinheritance (at least with respect to the intestate property). Indeed, one of the goals of my intestacy scheme is to promote the donative intent of the intestate. The intestacy scheme need not be as concerned, therefore, with giving the surviving partner a greater portion of the decedent's intestate estate than that to which she is "entitled."

This accrual method will tend to further each of the four values that should ground an intestacy scheme's provisions recognizing the surviving committed partner. First, an accrual approach to determining the surviving partner's portion of the decedent's intestate estate is designed to promote the imputed donative intent of the typical intestate decedent partner. It seems likely that the intestate decedent would want a partner of many years to take more of her intestate property than she would want a partner of few years to take.¹⁵⁸ Indeed, Professor Fellows recent empirical research into the donative preferences of those Minnesota residents living in a committed partnership provides some tentative support for this proposition.¹⁵⁹

¹⁵⁷ See UNIF. PROBATE CODE Part 2 (Elective Share of Surviving Spouse), general cmt. (amended 1997) (explaining that when the value of the survivor's credits exceeds the elective share amount, the survivor is not entitled to any additional amount from the decedent's estate, unless the survivor is entitled to a "supplemental elective share-amount" pursuant to § 2-202(b)).

¹⁵⁸ This is not to deny that in some cases intensity of affection will diminish over time.

¹⁵⁹ Professor Fellows and her colleagues asked their survey's respondents to dis-

Second, an accrual approach to the intestate inheritance rights of a surviving committed partner recognizes the claimant's financial contributions and acts of care with respect to the decedent partner to the extent that the duration of the cohabiting partnership correlates positively with the performance of such contributions and acts of care. Such a correlation seems highly likely in the run of cases. One could reasonably assume a direct relationship between the duration of the cohabiting partnership and the extent to which the surviving partner contributed to the intestate partner's well-being, including her financial well-being.

This assumption is the expressed rationale for the 1990 Uniform Probate Code's accrual-type elective share. The accrual-type elective share adjusts the surviving spouse's ultimate entitlement to the length of the marriage. The longer the marriage, the larger the "elective-share percentage." The sliding scale adjusts for the correspondingly greater contribution to the acquisition of the couple's marital property in a marriage of fifteen years than in a marriage of fifteen days.¹⁶⁰

tribute the property of a third-party where the third-party died survived by a partner and parents ("Scenario A") and, alternatively where she died survived by a partner and a child from a prior relationship ("Scenario C"). Fellows et al., *Committed Partners*, *supra* note 14, at 59-60. The Fellows survey's findings were as follows: With respect to Scenario A, for respondents with same-sex partners, "having been in the relationship for at least five years was positively associated with a preference for having the partner receive a greater share of the decedent's estate. Otherwise, the length of time spent living together had only a weak relationship to the distributive preferences." *Id.* at 61. For respondents with other-sex partners, "[b]oth having been in the relationship for at least five years and having cohabited for at least five years were each strongly related to a preference for having the partner receive a greater share of the decedent's estate." *Id.* With respect to Scenario C, for respondents with same-sex partners, "[b]oth the duration of the relationship and the time spent cohabiting were positively associated with a preference for having the partner inherit a greater share of the estate." *Id.* at 62. For respondents with other-sex partners, "[t]he length of the relationship showed no association to the distributive preferences of the respondents, but time spent cohabiting was positively associated with a preference for having the partner inherit a greater share of the estate." *Id.*

See also ALTA. LAW REFORM INST., *supra* note 11, at 81 (reporting that "[t]he Alberta lawyers we have spoken to . . . indicate that where the spouses both enter the second (or later) marriage with assets, they often leave their own assets to their children of an earlier marriage [however,] the longer the marriage, the more that is left to the surviving spouse").

¹⁶⁰ UNIF. PROBATE CODE Part 2 (Elective Share of Surviving Spouse), general cmt. (amended 1997). See also *id.* (explaining that "[i]n the short-term, later-in-life marriage . . . the effect of implementing [the accrual approach] is to decrease or even eliminate the entitlement of the surviving spouse [to an elective share] because in such a marriage neither spouse is likely to have contributed much, if anything, to the acquisition of the other's wealth").

Third, the accrual approach protects the surviving committed partner's reliance interests in the partnership. It seems reasonable as well to assume a direct relationship between the duration of the cohabiting partnership and the extent to which the survivor has forgone opportunities in order to preserve the partnership or otherwise has reordered her life so as to have become dependent financially on the intestate. As the partnership endures, the partners likely will increasingly come to intermingle their finances and their plans for the future. Moreover, they might increasingly come to see the property of each as being available to meet the needs of both partners. In this sense, each partner will come to rely upon the financial support of the other partner.

This assumption that a relationship is more likely to induce financial reliance as the duration of the relationship increases is the rationale underlying the American Law Institute's Principles of the Law of Family Dissolution's recharacterization of some or all separate property as marital property, where the marriage is of sufficient duration, for the purposes of the court's equitable division of property between the spouses at divorce.¹⁶¹ The Principles provide generally that, at the dissolution of a marriage, separate property of a spouse should be assigned to the spouse who owns it.¹⁶² However, the Principles also provide in certain circumstances for the recharacterization of separate property as marital property, the value of which marital property is then presumptively distributed equally between the spouses.¹⁶³

Section 4.12 of the Principles provides that at the dissolution of a marriage that exceeds a minimum duration, which minimum duration the adopting jurisdiction must specify, a portion of the separate property that a spouse held when she entered into the

¹⁶¹ See generally PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 4.12. This recharacterization of separate property as marital property does not apply in the case of domestic partnerships under the Principles. *Id.* § 6.04(3) (providing that "[p]roperty that would be recharacterized as marital property under § 4.12 if the parties had been married, is not domestic-partnership property").

¹⁶² *Id.* § 4.11(1).

¹⁶³ *Id.* § 4.12 (providing for the recharacterization of separate property as marital property in marriages that exceed a specified minimum duration); *id.* § 4.11(2) ("Separate property that is recharacterized as marital property under § 4.12 is allocated between the spouses under § 4.09 and not under . . . section [4.11(1)]."); *id.* § 4.09(1) (stating that generally "marital property and marital debts are divided at dissolution so that the spouses receive net shares equal in value, although not necessarily identical in kind.").

marriage should be recharacterized as marital property.¹⁶⁴ The percentage of separate property that is so recharacterized depends upon the length of the marriage. The longer the marriage, the greater the percentage of separate property that is recharacterized as marital property.¹⁶⁵ In a marriage of sufficient duration, all of the separate property that a spouse brought to the marriage is recharacterized as marital property.¹⁶⁶

In addition, this section of the Principles provides for the recharacterization at divorce of a portion of separate property acquired *during* the marriage where the marriage is of a specified minimum duration and the spouse who owns the separate property at issue has owned the property for a specified minimum duration.¹⁶⁷ The length of the marriage and the length of the property "holding period" determine how much of the separate property is recharacterized as marital property.¹⁶⁸ Where there is a sufficiently lengthy marriage and a sufficiently lengthy holding period, the full value of the separate property acquired during the marriage is recharacterized as marital property.¹⁶⁹

¹⁶⁴ *Id.* § 4.12(1).

¹⁶⁵ *Id.* § 4.12(1)(a).

¹⁶⁶ *Id.* § 4.12(1)(b). The drafters acknowledge that a "premise of this section [4.12], that after 30 or 35 years of marriage most people will expect that property their spouses brought into the marriage will be available to them jointly upon retirement or in an emergency, remains untested." *Id.* § 4.12, Reporter's Notes, cmt. a.

¹⁶⁷ PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 4.12(2). In general, property acquired during the marriage by either spouse is marital property. *Id.* § 4.03(1). Examples of property acquired during the marriage that is separate property include property acquired by one spouse by gift or inheritance and property acquired by one spouse after the spouses have entered into a written separation agreement and have begun living separate and apart. *Id.* §§ 4.03(2) & (4).

¹⁶⁸ *Id.* § 4.12(2)(a).

¹⁶⁹ *Id.* § 4.12(2)(b). The Principles' drafters offer the following illustration of how an adopting jurisdiction might choose to implement these rules:

Jurisdiction A implements the principles set forth in Paragraphs (1) and (2) with the following language: . . .

(a) For each year of marriage after the fifth year, four percent of the value of all separate property held by the spouses at the time of their marriage is treated at dissolution as the spouses' marital property. In marriages of 30 or more years' duration, all separate property held by the spouses at the time of the marriage is treated at dissolution as marital property.

(b) In marriages of five or more years' duration during which a spouse acquires separate property, four percent of the value of that separate property is treated at dissolution as marital property for each "augmented year" applicable to the property.

(1) The augmented years applicable to any item of separate property acquired during the marriage equal

The Principles' drafters expressly justified this recharacterization scheme on the principle of reliance:

After many years of marriage, spouses typically do not think of their separate-property assets as separate, even if they would be so classified under the technical property rules. Both spouses are likely to believe, for example, that such assets will be available to provide for their joint retirement, for a medical crisis of either spouse, or for other personal emergencies. The longer the marriage the more likely it is that the spouses will have made decisions about their employment or the use of their marital assets that are premised in part on such expectations about the separate property of both spouses.¹⁷⁰

Of course, the accrual method yields an approximation. It has not been designed to be exactly accurate in any given case. But that should not be a significant concern.¹⁷¹

The alternative would be to inquire in each case into the actual donative intent of the decedent, the actual extent to which the survivor contributed to the intestate's well-being, and the actual degree of reliance by the survivor on the continuation of the partnership and on the decedent. Such an open-ended inquiry,

-
- (A) the number of years from the fifth year after the property's acquisition to commencement of the dissolution action, plus
 - (B) half the number of years between the fifth year of marriage and the year of the property's acquisition.

- (2) This subsection does not apply to property acquired less than three years before commencement of the dissolution action.

Id. § 4.12, cmt. b.

¹⁷⁰ PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 4.12, cmt. a. The Principles' drafters analogize their approach to that taken by the Uniform Probate Code's elective share which gradually increases the size of the elective share available to a surviving spouse as the duration of the marriage increases.

If the marriage ends with the death of the wealthier spouse, the common law has traditionally provided the remedy of a forced share for survivors not otherwise provided for. The 1990 revision of the Uniform Probate Code gradually enlarges the spouse's forced share with the duration of the marriage according to a mechanical formula. Section 4.12 of these Principles provides an analogous remedy when the marriage ends with dissolution rather than death.

Id.

¹⁷¹ See Waggoner, *Marital Property Rights*, *supra* note 18, at 53 (noting with respect to the accrual method incorporated into the 1990 Uniform Probate Code's elective share provision that:

The advantage of the UPC system is that it avoids the administrative difficulties of post-death classification and tracing-to-source that would be endemic to a deferred-community elective share. The trade-off is that it does what its name implies—it approximates. No approximation system will give precisely accurate results in each given case.)

of course, would be costly and administratively burdensome and perhaps impracticable. The accrual approach allows for the emphasis on and promotion of the values of donative intent, reciprocity and reliance while maintaining an ease of administration.¹⁷²

Indeed, the proposed accrual method also serves the values of certainty and administrative convenience in at least two additional ways. First, the accrual method, which provides a relatively small share of the decedent's intestate estate to the survivor of a short-term cohabiting partnership, greatly reduces the incentive of both the claimed surviving partner and the decedent's other intestate heirs to litigate the issue of whether a committed partnership existed when the relationship at issue was, at most, a short-term relationship. This disincentive should tend to reduce greatly the amount of litigation over the issue.

Second, the accrual method reduces the likelihood of a court making a relatively costly "wrong" decision as to whether a qualifying committed cohabiting partnership existed. The determination as to whether a claimant was a committed partner such that she should share in the intestate estate will be more difficult—a closer call—in relationships of relatively short duration. In such relationships, however, even if the claimant qualifies as a surviving committed partner, she will take only a relatively small part of the decedent's intestate estate. Thus, the accrual method minimizes the consequence of a "wrong" decision.¹⁷³ With respect to relationships of greater duration, in which a greater share of the intestate estate is at stake, the evidence that such a relationship existed should be far more compelling and, therefore, the judgment as to whether such a relationship existed should be in most cases a much clearer call for the court (and potential litigants) to

¹⁷² See UNIF. PROBATE CODE Part 2 (Elective Share of Surviving Spouse), general cmt. (amended 1997) (noting that "[b]ecause ease of administration and predictability of result are prized features of the probate system," the 1990 Uniform Probate Code's elective share implements the marital partnership theory by means of an accrual approach which avoids the need to identify which of the spouses' property was marital and which was separate).

¹⁷³ Where the partners have registered their relationship, the court can be certain that the survivor is a committed partner. The accrual method is not needed in such instances as a means to reduce the cost of an incorrect decision as to whether the decedent and the claimant enjoyed a committed partnership. Even in the case of registered partners, however, the accrual schedule serves the values of reciprocity and reliance. Perhaps the certainty distinction between registered and unregistered partners is justification for application of an enhanced accrual schedule for the survivor of a registered partnership.

make.¹⁷⁴

B. *The Discounting Approach After a Fracture of the Partnership*

The Working Draft requires that a couple be cohabiting at the death of the intestate decedent in order for the surviving partner to qualify for an intestate share. That the partners had separated at the time of the intestate's death is an absolute bar to the survivor's taking. Generally, this is the approach of extant intestacy schemes that utilize a multi-factor approach to the identification of a committed partner.¹⁷⁵

A rationale that supports this approach is the view that separation of the couple is most commonly a manifestation of the desire of at least one of the parties to terminate the partnership: Separation generally signals an end to partnership status so that it is no longer appropriate to engage in a multi-factor inquiry into whether a partnership existed at the time of death.¹⁷⁶ A related rationale is that separation commonly coincides with a desire of the parties that the surviving partner not take a share of intestate property at the death of the first to die.¹⁷⁷

¹⁷⁴ It should be acknowledged that in some cases the determination of a start date for the cohabiting partnership period will be difficult and the exercise will result in increased litigation as contrasted with an all-or-nothing scheme in which one who qualifies as a surviving committed partner takes a specified share regardless of the duration of the cohabitation. These cases, in which the decedent has arguably died around the anniversary of the start of a cohabiting partnership period that is relatively uncertain, should be relatively rare. By way of illustration, in a case in which the start of the cohabiting partnership period is unclear but certainly was during the period of June to September of Year zero, a precise determination is unnecessary if the decedent died in December of Year eight. The surviving committed partner qualifies for an intestate share derived from an unreduced intestate share percentage of forty-eight percent (based on a cohabiting partnership period of at least eight years but less than nine years) regardless of whether the cohabiting partnership period began in June or September.

¹⁷⁵ See ALTA. LAW REFORM INST., *supra* note 11, at 123 ("New Hampshire, the five Australian states and the Waggoner proposal also require that the cohabitant be living with the deceased at the time of death in order to share upon intestacy.").

¹⁷⁶ Waggoner, *Marital Property Rights*, *supra* note 18, at 82 n.147

Under most intestacy laws, if spouses separate prior to the decedent's death, the survivor still takes an intestate share. The reason is that marriage creates a legal relationship that is terminated by divorce, not by separation. The most public way by which de facto partners typically manifest the creation of their relationship is by moving into the same household and manifest its termination by moving out.

Id. (citations omitted).

¹⁷⁷ *Id.* at 81-82 (speaking of decedents who had separated from their partner at

In pondering reform of Alberta, Canada's intestate succession act, the Alberta Law Reform Institute reasoned instructively as follows with respect to this issue:

[I]t makes no sense to assume that the deceased cohabitant would want his or her estate to go to the separated cohabitant after the relationship has come to an end. Separation with intent to end the relationship is for cohabitants the equivalent of divorce for married persons. Some cohabitants will see this as harsh and others will see it as a benefit, but it is a consequence of cohabiting outside marriage. The definition [of a cohabitant who shall qualify for a share of the decedent's intestate estate] should require that the couple be living together at the time of death.¹⁷⁸

The Alberta reformers' decision that a qualifying cohabitant must not have been separated from her partner at the partner's death follows from the reformers' antecedent decision that the central goal of the intestacy scheme should be to promote the donative wishes of the intestate.¹⁷⁹

Similarly, the Working Draft's approach to separation is consistent with an intestacy scheme that has as its sole or dominant value promoting the likely intent of the decedent. Indeed, a scheme so grounded might deny an intestate share also to a legal spouse who was living separate and apart from the decedent spouse at the intestate's death. One might reasonably conclude that the intestate who was living separate and apart from her spouse at her death would not have wanted her surviving spouse to take a share of her intestate estate, or at least would not have wanted him to take as great a share as had the couple been living together as wife and husband at the intestate's death.¹⁸⁰

the time of their deaths and commenting that "the defendants's leaving the household unmistakably manifested their intentions not to make any *voluntary* transfers to the [putative partners]").

¹⁷⁸ ALTA. LAW REFORM INST., *supra* note 11, at 122.

¹⁷⁹ *Id.* at 61 ("Unless some compelling social policy requires deviation from how most intestates in similar familiar circumstances would want to distribute their estate, intestacy rules should reflect those wishes. We recommend that this be the goal served by the *Intestate Succession Act.*"). The sole additional goal adopted by the Alberta reformers was to "create a clear and orderly scheme of distribution." *Id.*

¹⁸⁰ *But see id.* at 96 ("We are not convinced that separation [of the spouses] alone is sufficient reason to assume that most intestates . . . would no longer want their assets to pass to their surviving spouse."). The Alberta reformers would deny an intestate share to a separated surviving spouse, however, when one spouse has filed for divorce or brought an application for division of marital property, or where the spouses have divided their marital property with an intent to finalize their affairs. Again, the reformers focus here on the intent of the decedent: They conclude that

One might suppose an intent-centric intestacy scheme that allowed for the possibility that a surviving separated partner might take an intestate share. An intent-centric scheme might concern itself with the occasional partners who did not view their separation as necessarily permanent. More precisely, such a scheme might consider whether the intestate held out the hope for reconciliation with the separated partner. One might reasonably hypothesize that partners who are separated but who contemplate reconciliation would want the surviving partner to share in their intestate estate. An intent-centric scheme might inquire, therefore, into whether the intestate believed that she and her partner were likely to reconcile, and might award the survivor of such a partnership an intestate share.

The Working Draft does not concern itself with the possibility of reconciliation. This approach has the virtues of simplicity and objectivity. Once the couple separates there is no call for a difficult and subjective inquiry into whether the intestate viewed the separation as permanent or rather as a possibly temporary interruption of the committed partnership.

I propose to allow the survivor of a recently-fractured partnership at the death of one of the partners to take an intestate share in some cases. This proposal is not based in any large part, however, on the possibility that the partners might have reconciled. Indeed, my proposal would allow the survivor of a recently-fractured partnership to take an intestate share regardless of whether the intestate held out hope of reconciliation. Thus, my approach too avoids any inquiry into the intestate's state of mind with respect to the likelihood of reconciliation.

I propose that where the partnership between the decedent and the surviving committed partner fractured prior to the decedent's death and remained fractured at the time of the decedent's death, the intestate share percentage to which the survivor otherwise would be entitled shall be discounted in proportion to the length of time between the fracture and the intestate's death.¹⁸¹ The survivor's share shall be reduced by fifty percent if the partnership fractured in the year prior to the decedent's death, by

any of these three events signifies a point at which it is reasonable to assume that the intestate would not want the surviving spouse to be a beneficiary of her estate. *Id.* at 95.

¹⁸¹ The ending date of the partners' cohabitation would seem the most objective means to mark the fracture of the relationship.

seventy-five percent if the partnership fractured more than one year prior to the decedent's death but less than two year's prior to the decedent's death, and by one hundred percent if the partnership fractured more than two years prior to the decedent's death.¹⁸²

In addition, my proposal would deny a claimant any intestate share where the fracture of her relationship with the decedent led to a distribution of the parties' assets pursuant to contract or statute.¹⁸³ For example, if the relevant jurisdiction had adopted the American Law Institute's Principles of the Law of Family Dissolution with respect to the allocation of domestic partnership property between former partners,¹⁸⁴ and if a court proceeding so allocating domestic partnership property between the former partners followed the fracture of the partnership, the surviving former partner would not be entitled to any portion of the decedent's intestate estate. This bar follows from the rationale for my discounting approach which is discussed immediately below.

The reciprocity and reliance rationales principally ground this discounting approach. The surviving partner of a recently-fractured relationship is likely to have contributed to a significant portion of the wealth that the intestate possessed at her death and is far more likely to have done so as contrasted with the surviving former partner of a relatively long-ago fractured relationship. Moreover, the likelihood that the partners have equitably divided up their assets is least where the fracture occurred quite closely in time to the decedent's death. In addition, the survivor of a recently-fractured partnership in many cases is unlikely yet to have had the opportunity to undo her dependence on the intestate for her financial well-being. And, again, she is less likely to have done so as contrasted with the surviving former partner of a long-ago fractured partnership.

The Alberta reformers' assertion that "[s]eparation with intent to end the relationship is for cohabitants the equivalent of divorce for married persons"¹⁸⁵ might be generally accurate with respect to the donative intent of the partners and spouses. With respect to the financial consequences of the fracture, however, divorce and partnership separation are grossly dissimilar. The

¹⁸² See *infra* Appendix B § (a)(4).

¹⁸³ See *id.* § (a)(4)(iv).

¹⁸⁴ See *infra* notes 228-38 and accompanying text.

¹⁸⁵ ALTA. LAW REFORM INST., *supra* note 11 at 122.

equitable distribution of property and, in certain circumstances, the availability of an award of spousal support concomitant with divorce generally makes the inclusion of an ex-spouse within the intestacy scheme unnecessary to satisfy the reciprocity and reliance interests of the surviving ex-spouse. Absent an enforceable contract with respect to these matters, however, the fracture of a committed partnership generally entails no equitable distribution or support payments. Inclusion within the intestacy scheme of the ex-partner of a recently-fractured partnership, therefore, is necessary to protect the ex-partner's reliance and reciprocity interests.

I concede that, in allowing for an ex-partner to share in the decedent's intestate estate, my goal of promoting the values of reciprocity and reliance comes in conflict, in the run of cases, with my goal of promoting the intestate's likely donative intent. Such a conflict is not unknown to succession law. The elective share also subjugates testamentary intent in favor of values similar to my reciprocity and reliance values—the marital sharing and need/duty of support rationales.¹⁸⁶

The “marital sharing theory” grounding the elective share is reciprocity based: It asserts that both spouses necessarily contributed to the wealth accumulated by either spouse during the marriage and, therefore, both spouses are entitled to enjoy a portion of that wealth regardless of how the spouses held title to it.¹⁸⁷ The need/duty of support rationale grounding the elective share asserts that the decedent spouse owed a duty of support to her spouse during her life and that duty should continue to some extent at her death in light of, among other reasons, the surviving spouse's expectation that he will be supported.¹⁸⁸ Similarly, the reliance interest grounding my intestacy reform proposal centers

¹⁸⁶ See also Inheritance (Provision for Family and Dependents) Act 1975 c.63 (Eng.) (as amended by the Family Law Act 1996) § 1 (allowing a decedent's former spouse who has not remarried to apply for provision from the decedent's testate or intestate estate on the ground that the estate plan otherwise does not “make reasonable financial provision” for her).

¹⁸⁷ Gary, *Marital Partnership Theory*, *supra* note 70, at 572, 577 (discussing the marital partnership theory).

¹⁸⁸ *Id.* at 577. Professor Gary also lists as reasons why the testator spouse should provide for her surviving spouse (1) the moral duty that each spouse owes to the other, and (2) the public policy against allowing a surviving spouse to become a public charge when the decedent spouse's estate might be used to support the surviving spouse. *Id.* See also *id.* at 605 (“An elective share statute should protect a spouse who forgoes career opportunities to care for children.”).

on the notion that the partners' sacrifices for each other and for the good of the relationship give rise to an expectation of continued financial support and a corollary financial obligation that to some degree survives the death of a partner and survives the fracture of the partnership.

In nearly all of the common law states that provide a surviving spouse with an elective share, the circumstance that the spouses were living separate and apart at the death of the first of them to die does not impair the survivor's right to a forced share of the decedent's estate.¹⁸⁹ This is consistent with the two theories that ground the modern elective share. Similarly, allowing the surviving ex-partner of a recently-fractured partnership to share in the decedent's intestate estate promotes the reciprocity and reliance rationales.

Moreover, with respect to the elective share, the donative intent that is being subjugated is express. In contrast, my proposed intestacy scheme reform subjugates an imputed donative intent. The case for subjugating donative intent in favor of reliance and reciprocity interests, therefore, arguably is even stronger with respect to the intestate decedent.¹⁹⁰

Finally, I acknowledge that my proposed discounting approach would increase the amount of uncertainty associated with a multi-factor approach. Under extant multi-factor approach statutes and the Working Draft, a court must determine whether the partners separated prior to the decedent's death. My discounting approach requires in addition that the court determine with some precision when any such separation occurred. One would expect that in cases in which the separation date appears to be roughly one year prior or two years prior to the decedent's death but is not clearly greater than or less than respectively either one year

¹⁸⁹ Gary, *Adapting Intestacy Laws*, *supra* note 4, at 34 (noting that "in most common law states a surviving spouse has the right to an elective share of the estate of the decedent spouse, regardless of whether the spouses conducted their lives as married persons"). *But see id.* (pointing out that under New Jersey law, an elective share is unavailable to a spouse who was living apart from her spouse at his death, citing N.J. STAT. ANN. § 3B:8-1 (West 1999) and, similarly, under Oregon law, the elective share "can be denied or reduced if the spouses were living apart when one of the spouses died", citing OR. REV. STAT. § 114.135 (1999)).

¹⁹⁰ *See* Gary, *Adapting Intestacy Laws*, *supra* note 4, at 71 (pointing out that "[d]iscretion when a person dies intestate . . . present[s] different issues from the use of discretion in testamentary estates . . . [in that a] significant criticism of discretion in connection with testate decedents—interference with testamentary freedom—does not exist where the decedent has not exercised the testamentary freedom").

or two years prior to the decedent's death, the termination-date determination will be litigated at some length.¹⁹¹

C. Cases of Partial Intestacy

An intestacy statute controls the distribution of the decedent's probate property only to the extent that the distribution of that property is not governed by the decedent's will. A property owner who dies without a valid will dies wholly intestate with respect to her probate property.¹⁹² A property owner who dies with a valid will that does not successfully make a complete disposition of her probate property dies partially intestate.¹⁹³ In this latter case, the intestacy statute will govern the distribution of the decedent's probate property not governed by the decedent's will.

The Working Draft, however, applies only "[i]f an unmarried, adult decedent dies without a valid will and leaves a surviving committed partner."¹⁹⁴ Thus, the Working Draft has no application in cases of partial intestacy. Necessarily, in cases in which a committed partner dies partially intestate, other provisions of the intestacy scheme would govern the passing of the decedent's intestate property. Presumably, these provisions would pass the committed partner's intestate property to her close blood relations or, if she has no blood relations within the prescribed degree of relationship, to the state.

In support of the Working Draft's approach to partial intestacy, one might argue that where the testator has executed a will (even one that does not make a complete disposition of the testator's property) but has not seen fit to devise certain property to her partner by that will, this is a strong indication that the de-

¹⁹¹ An alternative approach that would reduce the incentive to litigate the exact date of fracture would adopt a sliding scale that decreases on a daily basis for the period from one to 730 days. Brad Joondeph suggested this approach to me.

¹⁹² Such a property owner might effectively pass much of her property at her death by means of "non-probate" will substitutes such as a joint tenancy or a revocable inter vivos trust.

¹⁹³ The testator's failure to include in her will a clause intended to dispose of the residue of her estate, or the invalidity or failure of such a residuary clause gift, might lead to the testator's partial intestacy. A residuary gift might fail, for example, where the gift is made to one who ultimately predeceases the testator, and where the lapsed gift is not redirected by an anti-lapse statute and does not pass to another residuary beneficiary. The property that is the subject of such a lapsed gift will pass by intestacy.

¹⁹⁴ *Infra* Appendix A § (a).

dent did not wish to provide that property at her death to her partner. The argument would continue that the presence of such a strong indication of intent would undermine our confidence in any multi-factor inquiry into the nature of the decedent's relationship with the claimed surviving committed partner so much so that it makes such an inquiry inappropriate. This argument assumes that the multi-factor inquiry ultimately seeks to determine whether the decedent's relationship with the claimed surviving committed partner was of such a quality that we should infer an intent on the part of this decedent to provide for her. If so, regardless of what our multi-factor inquiry revealed, our confidence in an inferred intent to provide certain property to the claimant would be undermined by our knowledge that the decedent partner executed a will and failed to devise that property to her.¹⁹⁵

If the rationale for not applying a multi-factor approach in cases of partial intestacy relates to a concern that the decedent's expressed testamentary intent suggests that she would not have wanted the surviving partner to take a share of her intestate property, then perhaps the multi-factor inquiry should be applied in cases of partial intestacy where the decedent executed her will prior to the onset of the committed partnership. This is so because the strength of the inference that the decedent intended to disinherit her partner depends critically on when the committed partner drafted her will. A pre-partnership will speaks less clearly of the testator's intent that the surviving partner be excluded from sharing in her intestate estate. The protection afforded to a surviving legal spouse who married a testator after the testator executed her will, and the rationale for such protection, provides an instructive parallel.

For example, section 2-301 of the Uniform Probate Code provides that a surviving spouse who married his spouse after the decedent spouse executed her will is entitled to the share of the decedent's probate estate that he would have received had the testator died intestate.¹⁹⁶ This entitlement of a spouse in the case of a premarital will is meant to effectuate the unexpressed intent

¹⁹⁵ A similar argument might be made in cases of partial or even total intestacy where the decedent utilized will substitutes to pass all or substantially all of her non-probate property to others than the surviving partner.

¹⁹⁶ UNIF. PROBATE CODE § 2-301(a) (amended 1997). This section excludes from the portion of the estate in which the surviving spouse is entitled to an intestate share any property devised to a child of the testator who was born prior to the

of the testator. The surviving spouse is not so entitled, therefore, if the will expresses the testator's intention that the will be effective notwithstanding any subsequent marriage by the testator, or if it is established that the testator executed the will in contemplation of her marriage to the surviving spouse, or if it is established that the testator provided for her spouse through non-probate means and did so with the intent that such provision be in lieu of a testamentary transfer.¹⁹⁷

The rationale of the statute, and similar statutes, is that the testator who died with a premarital will in effect would have executed a new will providing generously for the new spouse had she not overlooked that her pre-marital will did not so provide. The drafters of Uniform Probate Code section 2-301 explain: "This section reflects the view that the intestate share of the spouse . . . is what the testator would want the spouse to have if he or she had thought about the relationship of his or her old will to the new situation."¹⁹⁸

To be clear, I am not arguing that the surviving committed partner of a decedent with a valid pre-partnership will should take a portion of any property governed by the will and not devised to her. But where the decedent has died with a valid pre-partnership will and yet partially intestate, the rationale of section 2-301 and similar statutes relating to premarital wills suggests that the pre-partnership will should not be used to support an inference that the testator wished to exclude the surviving partner from sharing in the decedent's intestate estate.¹⁹⁹ Indeed, the premarital will statutes, and their rationale, operate in contravention of an effectively expressed testamentary intent, while application of the multi-factor approach in cases of partial intestacy would govern only property not subject to an effective testamentary expression.

In fact, I would apply my proposed accrual/multi-factor approach in all cases of partial intestacy. In cases in which the testator has not effectively expressed an intent to disinherit the

testator's marriage to the surviving spouse but who is not also a child of the surviving spouse, or is devised to any descendent of any such child. *Id.*

¹⁹⁷ *Id.* § 2-301(a)(1-3).

¹⁹⁸ UNIF. PROBATE CODE § 2-301, cmt. (amended 1997). See also Waggoner, *Spousal Rights in Our Multiple-Marriage Society*, *supra* note 2, at 748-51.

¹⁹⁹ Such an inference also is undermined in cases of partial intestacy in which the testator made a significant non-residuary devise or devises to the surviving partner or a failed residuary gift to the surviving partner.

surviving committed partner or otherwise to distribute her probate property to others than the surviving partner, I would not give great weight to any inference that the decedent partner would wish to disinherit the surviving committed partner. I would give much greater weight to the reciprocity and reliance interests of the surviving committed partner. This balancing compels application of the accrual/multi-factor approach to govern intestate property in cases of partial intestacy.

D. Standing to Challenge the Decedent Partner's Will

I would be more supportive of the Working Draft's restrictive approach in cases of partial intestacy if that approach would work to prevent challenges to a will by persons claiming to be a surviving committed partner in cases in which the decedent attempted to express testamentary intent and in which the claimed partnership was of relatively short duration. But not applying the multi-factor approach in cases of partial intestacy in many such cases will not deny one claiming to be a surviving committed partner standing to challenge the decedent partner's will. This is so because in many such cases the surviving committed partner will have a financial interest in seeing that a court finds the decedent to have died intestate.²⁰⁰

Generally, one with a direct pecuniary interest in the failure or partial failure of a will enjoys standing to bring a challenge against the will. For this reason, an heir who would take a greater amount from a decedent's intestate estate were the decedent to be found to have died intestate than she would take from the decedent's testate estate has standing to challenge the decedent's will. Under the Working Draft, the surviving committed partner is an heir if the decedent died wholly intestate. Thus, the surviving committed partner who would take more in intestacy than she was left under the will has a direct pecuniary interest in arguing that the decedent died wholly intestate. It would seem, therefore, that such a surviving committed partner would have standing to challenge any will that is offered in probate as the decedent's will, provided that the surviving partner's argument is that the decedent died wholly intestate and not merely partially intestate.

²⁰⁰ Pursuant to the Working Draft, a surviving committed partner is entitled to a minimum of fifty percent of the intestate estate even in cases where the duration of the partnership was a year or less. See *infra* Appendix A § (a).

In granting intestate inheritance rights to a surviving committed partner, a multi-factor approach statute might not only expand the number of persons who have standing to challenge the decedent's will²⁰¹ but also might add a layer of litigation to the will contest. Prerequisite to her challenge to the decedent's will, the claimed surviving committed partner would have to demonstrate to the court that she qualifies as a surviving committed partner. This increased number of potential will claimants and added complexity of the will contest litigation would undermine the value of certainty and ease of administration even in cases where the decedent died fully testate.

In the name of certainty and administrative convenience, my proposal would limit the standing of a claimed surviving committed partner to challenge a decedent's will where standing is based on the status of committed partner. I would limit standing as follows:

Unless no other heir, aside from a claimed surviving committed partner, or no other group of heirs, not including a claimed surviving committed partner, has a net pecuniary interest in challenging respectively the decedent's will, or any

²⁰¹ Depending on how a multi-factor approach statute alters who would take from a decedent as an intestate heir, the multi-factor approach might instead decrease the number of persons who have standing to challenge a will. For example, my proposed intestacy reform would make the surviving committed partner the sole intestate heir when the decedent and the surviving partner cohabited in a partnership for a period of fifteen years or more and the decedent is not survived by a parent or a child not also the child of the surviving committed partner. *Infra* Appendix B § (a) (1)-(3). Assuming, for example, such a decedent who died survived by five siblings as her closest blood relations, my proposal would give standing to the surviving committed partner to challenge the decedent's will on the basis of her status as an heir but would also result in the decedent's five siblings losing standing to challenge the decedent's will on the basis of their status as heirs.

The hypothetical above illustrates an issue of unfairness arising from extant intestacy statutes: Assume twin brothers Adam and Brian are partnered respectively with a wife of fifteen years and a non-marital partner of fifteen years. Should Adam die survived only by his wife and his brother Brian and leaving a will devising his estate to his wife, Brian would not have standing in many states to challenge that will because in many states Brian would not be an intestate heir. *See* UNIF. PROBATE CODE § 2-102(1) (providing that the surviving spouse shall take the entire intestate estate where no descendant or parent of the decedent survives the decedent). However, should Brian die survived only by his non-marital partner and Adam and leaving a will devising his estate to his non-marital partner, in all states Adam would have standing to challenge that will, as in all states (with the possible exceptions of Hawaii and Vermont) Adam would be the sole intestate heir. *See* UNIF. PROBATE CODE § 2-103 (amended 1997) (providing that the decedent's surviving siblings shall take the entire intestate estate where no spouse, descendant or parent of the decedent survives the decedent).

individual provision in the will, equal to or greater than the net pecuniary interest of the claimed committed partner in challenging respectively the decedent's will, or any individual provision in the will, no person who would take less than fifty percent of the decedent's intestate estate as the surviving committed partner shall have standing to challenge a decedent's will, or individual provision in the will, by virtue of the fact that the person is or claims to be the testator's surviving committed partner. This provision shall not defeat a person's standing to challenge a decedent's will where standing is asserted on some basis other than the challenger's claimed status as the decedent's surviving committed partner.²⁰²

Recall that, pursuant to my proposed accrual approach, a surviving committed partner does not take fifty percent or more of the decedent partner's intestate estate unless she and the decedent partner cohabited in a partnership of nine years or greater duration.²⁰³ Thus, my proposal would limit standing to challenge a decedent's will in many cases so that a claimed surviving committed partner will not have standing to challenge a decedent's will (where standing is based on committed partner status) unless she is able to demonstrate that she and the decedent enjoyed a cohabiting partnership of nine years or greater duration. I think it reasonable to hypothesize that in most cases of claimed relationships of such long duration, the evidence of the committed partnership will be compelling. Thus, in most such cases, the claimant's need to demonstrate to the court that she qualifies as a surviving committed partner should not lead in and of itself to prolonged litigation.²⁰⁴

Regardless of the claimed duration of the claimed committed partnership, however, my proposal would not operate to deny standing to a claimed surviving committed partner to challenge a decedent's will if no other heir or group of heirs collectively has a

²⁰² *Infra* Appendix B § (c).

²⁰³ *Id.* § (a)(1).

²⁰⁴ While it might further promote certainty and ease of administration if my approach were to deny the surviving committed partner standing to challenge a will in all cases, such an approach would be unacceptable in that it would result in cases in which no person had standing to challenge a will. For example, where the decedent dies survived by a committed partner of a relationship of more than fifteen years duration but is not survived by a descendant not also a descendant of the surviving committed partner and is not survived by a parent, the survivor committed partner would be the sole intestate heir. See *infra* Appendix B § (a) (1)-(3). If one offered into probate a document purporting to be the decedent's only will, and if the surviving committed partner is denied standing to challenge that will, no person would have standing to challenge that will.

net pecuniary interest in challenging respectively the decedent's will, or any provision thereof, equal to or greater than that of the claimed committed partner. Assume, for example, that the decedent has died testate survived only by a brother and a surviving committed partner from a relationship that was of eight years duration. Had the decedent died intestate, her brother would be entitled under my accrual approach to 52% of the decedent's intestate estate. The surviving committed partner would be entitled to 48% of the decedent's intestate estate.²⁰⁵ Whether or not the surviving committed partner would have standing to challenge the decedent's will would depend on the will's distribution scheme.

Let's assume three alternate testamentary schemes. First, let's assume that the testator devised all of her property to her favorite charity. In this case, the testator's brother has a pecuniary interest in challenging the will greater than that of the surviving committed partner: If the will is held to be invalid, he will have a net gain of 52% of the testator's estate and the surviving committed partner will have a net gain of 48% of the testator's estate. The surviving committed partner, therefore, would not have standing under my proposal to challenge the will. My approach relies on the unity of interests between the brother and the surviving committed partner in seeking to prevent probate of a will that does not reflect the testator's true wishes and, simultaneously in this case, to protect the interests of the surviving committed partner.

Next, let's assume that the testator devised all of her property to her brother. In this case, the surviving committed partner has a pecuniary interest in challenging the will greater than that of any other heir or group of other heirs.²⁰⁶ If the court finds the testator to have died intestate, the brother suffers a net loss of 48% of the decedent's estate while the surviving committed partner enjoys a net gain of 48% of the decedent's estate. In such a circumstance, we cannot rely on the brother to protect the surviving committed partner's interest (or to seek to prevent probate of a will that does not reflect the testator's true wishes). For this reason, my proposal would extend standing to challenge the decedent's will to the surviving committed partner even though she

²⁰⁵ *Infra* Appendix B § (a)(1).

²⁰⁶ Indeed, there is only one other heir—the brother—in my hypothetical.

would stand to inherit less than 50% of the decedent's intestate estate as the surviving committed partner.

Finally, let's assume that the testator devised one-half of the value of her property to her favorite charity and one-half of the value of her property to her brother. Let's further assume that even if these are deemed to be residuary gifts, the relevant law is that there is no residue of a residue, so that should either gift fail, the gift would pass by intestacy. In this case, my proposal would deny standing to the surviving committed partner to assert any challenge that goes only to the devise to the charity. This is because the brother has a pecuniary interest in challenging that devise that is not less than the pecuniary interest that the surviving committed partner has in challenging the devise.²⁰⁷ My proposal, however, would not deny standing to the surviving committed partner to assert any challenge that goes only to the devise to the brother. The surviving committed partner obviously would gain more from such a challenge if successful than would the brother who would keep only fifty-two cents in intestacy for every dollar that he lost in the will challenge—a net loss. Finally, my proposal also would not deny standing to the surviving committed partner to assert any challenge that goes to the entire will. It is true that the brother will take 52% of the estate if the challenge is successful while the surviving committed partner will take only 48% of the estate. But the surviving committed partner has a greater pecuniary interest in the lawsuit: She will enjoy a net gain of 48% of the estate if the court finds the decedent to have died intestate, while the brother would enjoy a net gain of only 2%.²⁰⁸

²⁰⁷ The brother would gain 52% of the property that the charity loses, while the surviving committed partner would gain only 48% of the property that the charity loses.

²⁰⁸ Similarly, when the issue is whether a group of heirs has a net pecuniary interest in challenging the will equal to or greater than the claimed committed partner's net pecuniary interest in challenging the will, it is the net gain of the group as a whole that is the relevant point of comparison. *Infra* Appendix B § (c). For example, assume that the decedent has died survived only by her committed partner of 6½ years and the decedent's four siblings—Anna, Brian, Chris, and Danny. Under my accrual approach, the partner is entitled to 36% of the intestate estate and each of the siblings is entitled to 16% of the intestate estate. *See id.* § (a). Assume further that a will is offered for probate that devises property worth 25% of the estate each to Anna and Brian and the residue of the estate to charity.

The committed partner will have standing to bring a challenge to the entire will because no "group of heirs" would have a pecuniary interest as great as hers in challenging the entire will. As a group, the siblings would enjoy a net gain from a finding of intestacy: They would take 64% of the estate under intestacy as contrasted with 50% of the estate under the will. This net gain of 14% of the estate,

IV

THE REQUIREMENTS FOR QUALIFICATION AS A
SURVIVING COMMITTED PARTNER

My proposed intestacy scheme seeks to focus the inquiry into whether a claimant qualifies as a surviving committed partner on several objective factors and various subjective factors that directly implicate one or more of the values of donative intent, reciprocity, reliance, and ease of administration.

A. *The Objective Requirements*

My proposal borrows from Professor Waggoner's Working Draft the objective requirements that the surviving committed partner have been an unmarried adult at the decedent's death who would not have been prohibited under the law of the relevant jurisdiction from marrying the decedent on account of the blood or adoptive relationship between the claimant and the decedent.²⁰⁹ I concur with Professor Waggoner's judgment that the absence of any of these factors undermines to too great a degree

however, is less than the net gain of 36% of the estate that the surviving committed partner would enjoy if the decedent were found to have died intestate. Moreover no subgroup of siblings would enjoy a net pecuniary gain from a successful challenge to the entire will as large as that of the committed partner. The subgroup of Chris and Danny would come closest with a net gain of 32% of the estate.

The committed partner would not have standing, however, to challenge only the gift to charity. The siblings as a group have a greater pecuniary interest in such a challenge: They would take 64% of the property that the charity would lose whereas the committed partner would take only 36% of the property that the charity would lose. This is a net gain of 32% of the estate by the siblings versus a net gain of 18% of the estate by the committed partner. Therefore, the committed partner may not bring such a challenge.

Nor would the committed partner have standing to challenge only the gift to Anna or only the gift to Brian. The committed partner would gain 36% of any property lost by, for example, Anna—a net gain of 9% of the estate. But the subgroup of siblings consisting of Brian, Chris, and Danny would gain 48% of this property—a net gain of 12% of the estate.

²⁰⁹ See *infra* Appendix A § (b). With respect to the qualification that the claimant and the decedent must not have been within a familial relationship to each other that would have disqualified them from marrying each other, the Working Draft actually provides that the claimant must "not [have been] prohibited from marrying the decedent under the law of this state by reason of a blood relationship of the decedent." *Id.* I propose expanding this language to include also adoptive relationships that the governing state's law makes relevant in disqualifying the relatives from marrying each other. See UNIF. MARRIAGE AND DIVORCE ACT § 207, cmt. ("Marriages of brothers and sisters by adoption are prohibited because of the social interest in discouraging romantic attachments between such persons even if there is no genetic risk.").

our ability to be confident in attributing to the decedent an intention to benefit the claimant.²¹⁰

1. *Cohabitation for a Minimum Duration as an Absolute Prerequisite to Taking an Intestate Share*

My proposal also shares in common with the Working Draft the absolute requirement that the decedent and the surviving committed partner had cohabited. My proposal's requirements with respect to cohabitation differ, however, from those of the Working Draft in two important respects. First, the Working Draft requires that the surviving committed partner and the decedent have been cohabiting at the decedent's death in order for the surviving partner to take an intestate share. My approach, however, allows the survivor of a recently-fractured partnership to take a discounted intestate share in certain cases, for reasons that I have discussed above.²¹¹

Second, the Working Draft does not employ any minimum cohabitation period that must be satisfied before a surviving committed partner may take an intestate share. My proposal, however, for reasons discussed below, employs a minimum cohabiting partnership duration—three years—before the surviving committed partner may take any portion of the decedent's intestate estate.²¹²

Professor Waggoner's Working Draft requires that a surviving committed partner, at the decedent's death, have been sharing a common household with the decedent.²¹³ The Working Draft defines "sharing a common household" to mean "that the decedent and the individual shared the same place to live, whether or not one or both had other places to live and whether or not one or both were physically residing somewhere else at the decedent's

²¹⁰ See Waggoner, *Marital Property Rights*, *supra* note 18, at 81. Professor Waggoner points out also that the requirement that the decedent have been unmarried at her death precludes the possibility that a court would be called on under the Working Draft to allocate property between a spouse and a person claiming to be a surviving committed partner. *Id.* at 81 n.146.

²¹¹ See *supra* notes 175-91 and accompanying text (discussing the discounting approach after a fracture of the partnership).

²¹² See Oldham, *supra* note 1, at 1421 (stating that with respect to the regulation of unmarried opposite-sex cohabitants, "[a]lmost all commentators, as well as the drafters of the ALI proposal, accept that some 'trial' period should be accepted where no rights arise [unless the parties agree to the contrary]").

²¹³ *Infra* Appendix A § (b)(iii).

death.”²¹⁴ Defining cohabitation in this manner allows for equal inclusion of couples in which the partners were physically residing apart during a portion of their cohabiting partnership due to “job-related or involuntary separation, such as where one or the other [partner] was on a military mission, was in prison, was hospitalized, or was in a nursing home.”²¹⁵

Professor Waggoner chose not to define a “surviving committed partner” so as to require that the partner and the decedent had cohabited for a specified minimum duration. He did not wish to preclude in all cases the survivor of a short-term partnership of great commitment from demonstrating that she is deserving of an intestate share of the decedent’s estate.²¹⁶ Rather, Professor Waggoner chose to incorporate into the Working Draft a presumption that arises based on a cohabitation period of a specified duration. The Working Draft presumes that a claimant’s relationship with the decedent was sufficiently committed²¹⁷ such that the claimant who otherwise satisfies the objective elements of the Working Draft should qualify for an intestate share of the decedent’s estate if the claimant and the decedent cohabited for periods totaling five years during the six years immediately preceding the decedent’s death.²¹⁸ Thus, under the Working Draft, a claimant need not prove a cohabitation period of any specified duration, but she would find it helpful to her claim if she could do so.²¹⁹

²¹⁴ *Id.* § (c). The American Law Institute’s Principles of the Law of Family Dissolution define cohabitation for the purpose of qualifying cohabitants as domestic partners as follows: “Persons *maintain a common household* when they share a primary residence only with each other and family members; or when, if they share a household with other unrelated persons, they act jointly, rather than as individuals, with respect to management of the household.” PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03(4).

²¹⁵ Waggoner, *Marital Property Rights*, *supra* note 18, at 81 n.145.

²¹⁶ *Id.* at 86 & n.158.

²¹⁷ The Working Draft does not use the term “sufficiently committed” but rather inquires into whether the relationship at issue was sufficiently “marriage-like.” *Infra* Appendix A §§ (b)(iii), (d).

²¹⁸ *Infra* Appendix A § (e)(1). One opposing the claimant may rebut this presumption by a preponderance of the evidence, unless the presumption arises in conjunction with another of several other factors also giving rise to such a presumption, in which case the opponent may rebut the presumption only by clear and convincing evidence. *Id.* § (f).

²¹⁹ The American Law Institute’s Principles of the Law of Family Dissolution similarly provide for a rebuttable presumption that persons not related by blood or adoption are domestic partners when the persons have maintained a common household for a continuous period that equals or exceeds a “*cohabitation period*, set in a rule of statewide application.” This presumption may be rebutted upon a showing

My proposal adopts the Working Draft's definition of "sharing a common household" as its definition of cohabitation.²²⁰ My proposal requires as a prerequisite for her taking an intestate share that a surviving committed partner had cohabited with the decedent in that the unreduced intestate share percentage is determined by the length of time in which the couple "cohabited in a partnership."²²¹ Recall that, at the high end of the scale, if the decedent and the surviving committed partner cohabited in a partnership for a period of at least fifteen years, the unreduced intestate share percentage is one hundred percent of the intestate estate. At the low end of the scale, if the decedent and the surviving committed partner cohabited in a partnership for a period of at least three years but less than four years, the unreduced intestate share percentage is eighteen percent of the intestate estate. If the claimant did not cohabit in a partnership with the decedent for a period of at least three years, she shall not be entitled to any portion of the intestate estate.²²²

Requiring cohabitation in a partnership for a period of at least three years as a prerequisite to the claimed surviving committed partner taking any portion of the intestate estate well balances and serves all four values that ground my intestacy scheme. Consider first generally the rationale for distinguishing between claimants who cohabited with the decedent and those who did not. The rationale for such an approach is that the absence of cohabitation by the putative partners is an excellent marker for insufficient commitment—as the intestacy scheme defines com-

that the two people "did not share a life together as a couple." PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03(3). The Principles further provide a rule that persons who have maintained a common household along with their common child for a continuous period that equals or exceeds a "*cohabitation parenting period*, set in a rule of statewide application" are domestic partners. *Id.* § 6.03(2).

Under the Principles, when a claimant has not maintained a common household with the putative domestic partner for a specified cohabitation period or maintained a common household with the putative domestic partner and their common child for a specified cohabiting parenting period, the claimant must not only show that the parties cohabited and shared a life together as a couple, but also that they did so "for a significant period of time." *Id.* at § 6.03(6). Reliance is central to the inquiry into whether such a period of time is "significant" under the Principles. Whether the period of time is significant "is determined in light of all the Paragraph (7) circumstances of the parties' relationship and, particularly, the extent to which those circumstances have wrought change in the life of one or both parties." *Id.*

²²⁰ See *infra* Appendix B § (a)(i).

²²¹ See *id.* § (a)(1).

²²² See *id.*

mitment.²²³ The principal virtue of a cohabitation requirement is that it provides a largely objective means to lock from the courthouse an entire group of potential claimants who, on the whole, would be unlikely to succeed even absent the absolute bar.

Next, consider the cohabitation requirement in light of the values that ground my proposed intestacy scheme. It seems reasonable to conclude that in cases in which the claimant has not cohabited with the decedent, the decedent would not likely have wanted her estate to provide for the claimant after the decedent's death, the claimant is not likely to have engaged in care-taking with respect to the decedent and is not likely to have contributed to the decedent's economic well-being, and the claimant is not likely to have relied upon her relationship with the decedent to the claimant's economic detriment. It seems reasonable to conclude, therefore, that the vast majority (and too many) of likely claimants who have not cohabited with the decedent would be unable to show by clear and convincing evidence that they have developed the type of relationship—"life together with the decedent as a couple in an emotionally and physically intimate partnership"²²⁴—such that they will succeed in convincing the court applying my scheme that they should take a share of the decedent's intestate estate. In furtherance of administrative convenience, my proposed scheme does not let any of them try.

I believe the reasoning that grounds my intestacy scheme having any cohabitation requirement supports also extending the requirement to bar claims by those who did not cohabit in a partnership with the decedent for at least three years. I have sought to select a minimum cohabiting partnership period of such duration that it will serve as an absolute bar only to those persons in a pool of otherwise potential claimants the majority of which clearly would be unlikely to succeed, even absent the bar, in demonstrating by clear and convincing evidence a partnership evidencing the donative intent, reciprocity and reliance interests that my proposed intestacy scheme seeks to recognize.²²⁵ The

²²³ See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.04, cmt. a ("The period during which the parties shared a primary residence can ordinarily be established with objective evidence, and in most cases is substantially congruent with the period during which the parties shared life together as a couple").

²²⁴ See *infra* Appendix B § (b)(2).

²²⁵ ALTA. LAW REFORM INST., *supra* note 11, at 121 (law reform commission arguing that "[t]he three-year [minimum] period along with the requirement that the

theory of my proposal is that even if the decedent of a relationship with less than a three-year cohabiting partnership period is likely to have wanted the survivor to share in her estate, such a relationship is unlikely to have given rise to reciprocity and reliance interests of the type that my proposal seeks to protect.

Moreover, given that my proposal places the burden on the claimant to demonstrate by clear and convincing evidence that her relationship with the decedent should qualify her as a surviving committed partner,²²⁶ the survivor of a relationship of very short duration is likely to be handicapped in carrying her burden by the lack of any conduct enduring over a significant period of time that might be helpful to the court in evaluating the nature of the relationship. The Alberta Law Institute has commented on the importance of evaluating a relationship over a significant period of time in support of its recommendation for reform of the Alberta Intestate Succession Act, which reform would employ a minimum three-year cohabitation period before a claimant might assert a claim as a surviving committed partner to a share of a decedent's intestate estate:

It is just too difficult, if not impossible, to determine if a relationship is marriage-like unless one has a significant period of conduct upon which to base this judgment. The reason for this is that the daily life of couples living within marriage or outside marriage is similar. What differs is the commitment to the permanence of the relationship and this can only be judged with time. . . .

. . . .

We remain of the view that the three-year period is the appropriate period. A shorter period is likely to catch casual relationships and trial marriages and in such relationships, it is unlikely the deceased would want the surviving cohabitant to share in the estate. The relationships we are trying to identify are those which are stable and have a commitment to permanence. A minimum period of cohabitation is required to evidence these characteristics.²²⁷

The length of the minimum period need not be set, however, to prevent a windfall for those who pass the bar. This is because my scheme uses an accrual approach to determine the size of the intestate share that the surviving committed partner takes. Thus,

relationship be marriage-like will be a sufficient marker of the type of relationship in which the deceased would want the surviving cohabitant to share in his or her estate").

²²⁶ See *infra* Appendix B § (b)(2).

²²⁷ ALTA. LAW REFORM INST., *supra* note 11, at 119-21.

once it is determined that one qualifies as a committed partner, the size of the intestate share must still be determined. That determination will be made with respect to the duration of the cohabiting partnership period.

The ALI's Principles of the Law of Family Dissolution and accompanying comments are instructive with respect to this dichotomy. The Principles provide for certain financial consequences upon the termination by fracture of a qualifying domestic partnership.²²⁸ First, the Principles call for the allocation of "domestic-partnership property" upon the fracture of the qualifying domestic partnership. In general, upon dissolution of the partnership, each partner is presumptively entitled to domestic-partnership property worth one half of the total value of domestic-partnership property that is owned by either partner.²²⁹ The Principles define domestic-partnership property as property that would have been marital property under the Principles had the domestic partners been married for the duration of their domes-

²²⁸ The Principles seek to promote two goals through their rules governing the financial consequences of the dissolution by fracture of a domestic partnership. First, the rules seek to fairly distribute the financial gains and losses arising from the termination of the domestic partnership. And second, the rules seek to protect society from having to support one of the former domestic partners when that support more appropriately should be provided by the other former domestic partner. See *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* § 6.02. Where a jurisdiction has adopted the Principles or similar standards giving rise to financial rights and obligations upon the fracture of a committed partnership, consistency and a policy favoring promotion of stability in intimate relationships would dictate that the jurisdiction also give inheritance rights to the survivor of a partnership that lasted until the death of one of them. See *RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS* § 2.2, cmt. g:

To the extent that a domestic partner is treated as having the status of a spouse, conferring rights on such a partner on the dissolution of the relationship, the domestic partner who remains in that relationship with the decedent until the decedent's death should be treated as a legal spouse for purposes of intestacy.

²²⁹ Section 6.05 of the Principles, in conjunction with Sections 4.09 and 4.10 of the Principles, calls for the allocation of "domestic-partnership property" upon the fracture of the qualifying domestic partnership. Section 6.05 provides quite simply that "[d]omestic-partnership property should be divided according to the principles set forth for the division of marital property in § 4.09 and § 4.10." *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* § 6.05. Sections 4.09 and 4.10 provide generally that, at dissolution of the marriage, each spouse is presumptively entitled to one half of the marital property owned by either spouse. Section 4.09(1) provides that generally "marital property and marital debts are divided at dissolution so that the spouses receive net shares equal in value, although not necessarily identical in kind." *Id.* § 4.09.

tic-partnership period.²³⁰ The Principles further provide that, generally, property earned by either spouse during the marriage is marital property.²³¹ Thus, under the Principles, generally, property that is earned by either domestic partner during the domestic partnership is domestic-partnership property.

Second, the Principles call for “compensatory payments” (analogous to alimony) for certain domestic partners.²³² In order to qualify for a compensatory payment, the domestic partner first must show that she has incurred a compensable loss arising from the fracture of the domestic partnership into separate economic units.²³³ Examples of compensable losses include (1) a loss in earning capacity of one domestic partner that she incurred during the domestic partnership and that continues after the domestic partnership and that is related to her performing a disproportionate share of the care of the children of either domestic partner,²³⁴ and, (2) only when the domestic partnership is

²³⁰ *Id.* § 6.04(1). Paragraph 2 of Section 6.04 provides that:

The domestic-partnership period

(a) starts when the domestic partners began sharing a primary residence, unless either partner shows that the parties did not begin sharing life together as a couple until a later date, in which case the domestic-partnership period starts on that later date, and

(b) ends when the parties ceased sharing a primary residence.

For the purpose of this Paragraph, parties who are the biological parents of a common child began sharing life together as a couple no later than the date on which their common child was conceived.

Id. § 6.04(2).

²³¹ See *id.* § 4.03 (providing that “[p]roperty acquired during marriage is marital property” except that “[i]nheritances, including bequests and devises, and gifts from third parties, are the separate property of the acquiring spouse even if acquired during marriage” and “[p]roperty acquired during marriage but after the parties have commenced living apart pursuant to either a written separation agreement or a judicial decree, is the separate property of the acquiring spouse unless the agreement or decree specifies otherwise”).

²³² Section 6.06 of the Principles provides that generally:

(a) a domestic partner is entitled to compensatory payments on the same basis as a spouse under Chapter 5, and

(b) wherever a rule implementing a Chapter 5 principle makes the duration of the marriage a relevant factor, the application of that principle in this Chapter should instead employ the duration of the domestic-partnership period, as defined in § 6.04(2).

Id. § 6.06.

²³³ See generally PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 5.03 (listing the kinds of losses that are compensable with compensatory payments).

²³⁴ *Id.* § 5.05.

of a qualifying duration, a loss in living standard experienced by one of the domestic partners upon dissolution of the partnership that is attributable to the fact that the claimant domestic partner has significantly less wealth or earning capacity than the other domestic partner.²³⁵ In general, the amount of the compensatory payment to which a domestic partner is entitled relating to these compensable losses is proportional to (a) the disparity in income between the claimant domestic partner and her fellow domestic partner and (b) the duration of the domestic partnership or the child care period.²³⁶

Thus, under the Principles, that one qualifies as a domestic partner does not in itself entitle one at fracture of the partnership to an allocation of any property owned by the other domestic partner and does not, without more, qualify one for compensatory payments. This has implications for the choice of duration of the minimum cohabitation period and minimum cohabitation parenting period, which each jurisdiction adopting the Principles must set for itself, that give rise under the Principles to a pre-

²³⁵ *Id.* § 5.04.

²³⁶ For example, Section 5.04 of the Principles, entitled “Compensation for Loss of Marital Living Standard,” provides:

- (1) A person married to someone with significantly greater wealth or earning capacity is entitled at dissolution to compensation for a portion of the loss in the standard of living he or she would otherwise experience, when the marriage was of sufficient duration that equity requires that some portion of the loss be treated as the spouses’ joint responsibility.
- (2) Entitlement to an award under this section should be determined by a rule of statewide application under which a presumption of entitlement arises in marriages of specified duration and spousal income disparity.
- (3) The value of the award made under this section should be determined by a rule of statewide application that sets a presumptive award of periodic payments calculated by applying a specified percentage to the difference between the incomes the spouses are expected to have after dissolution. This percentage is referred to in this Chapter as the *durational factor*, and should increase with the duration of the marriage until it reaches a maximum value set by the rule.

Id. § 5.04.

A comment to this section illustrates an application of this principle as follows:

A presumption arises that a spouse is entitled to an award under this section whenever that spouse has been married five years or more to a person whose income at dissolution is expected to be at least 25 percent greater than the claimant’s. The presumptive award shall equal the difference in the spouses’ expected incomes at dissolution, multiplied by the appropriate durational factor. The durational factor is equal to the years of marriage multiplied by .01, but shall in no case exceed .4.

Id. § 5.04 cmt. a, illus. 1.

sumption that two cohabitants are domestic partners.²³⁷ A comment to section 6.03 of the Principles explains that these minimum periods are meant to promote administrative convenience but are not needed as guards against windfall awards:

This section requires that adopting jurisdictions specify a Paragraph (2) *cohabitation parenting period* and a Paragraph (3) *cohabitation period*. Persons treated as domestic partners under this section must also meet the requirements of Chapter 5 in order to obtain an award of compensatory payments. Chapter 5 imposes its own durational thresholds for award eligibility. In addition, for those meeting the threshold requirement, the value of any award of compensatory payments is ordinarily proportional to the duration of the parties' cohabitation. The amount of the parties' property subject to division under section 6.05 will also, in the ordinary case, be proportional to the duration of the parties' cohabitation. Thus, this section does not require long cohabitation periods to screen out inappropriate compensatory-payment awards or property-distribution awards.

The required durations do need to be long enough to make it likely that the parties have established a life together as a couple and that their life together as a couple has had some significant impact on the circumstances of one or both parties.²³⁸

Similarly, my proposed intestacy scheme sets at three years the minimum cohabiting partnership duration because, in my theory, this is the period at which there is first a *likelihood* that the relationship between the decedent and the surviving claimant has given rise to the donative intent, reciprocity and reliance interests that my intestacy proposal seeks to protect.²³⁹ In light of this likelihood, my proposal allows the survivors of relationships with

²³⁷ In the case of the presumption arising with respect to a cohabiting period, the presumption is rebuttable. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03(3). In the case of the "presumption" arising with respect to a cohabiting parenting period, the "presumption" is not rebuttable. *Id.* § 6.03(2).

²³⁸ *Id.* § 6.03 cmt. d (internal citations omitted).

²³⁹ See Oldham, *supra* note 1, at 1421-22 (noting empirical studies showing that of U.S. opposite-sex cohabitants who do not marry, "one-sixth last three years and about 10% last five years" in support of acceptance of a three-year "safe-harbor" period before rights would arise from the cohabitation); ALTA. LAW REFORM INST., *supra* note 11, at 114-15 (noting that of the various Canadian provincial statutes that have extended protections to cohabitants in the areas of intestacy, support obligations, family relief, and wrongful death most require cohabitation for a specified minimum period (ranging from one to five years), with the most common such period being three years); N.H. REV. STAT. ANN. § 457:39 (1992) (providing a spouse's intestate share to a surviving non-marital partner of an opposite-sex non-marital

such a cohabiting partnership duration into the courthouse. The portion of the decedent's intestate estate to which the survivor is entitled, if any, is then proportional to the duration of the couple's cohabiting partnership. Whether the survivor who has gotten through the courthouse door is entitled to any such portion, however, is determined by the court using a subjective multi-factor analysis.

B. The Subjective Inquiry Weighing Multiple Factors

Under my proposal, a surviving committed partner is one who satisfies all of the objective elements set out above in this Article and, in addition, satisfies at least one of two additional criteria. The otherwise qualified claimant may succeed and take an intestate share by demonstrating that, during the decedent's life, she and the decedent registered as each others' domestic partner in accordance with the State's requirements and procedures for the registration of domestic partnerships. In the alternative, the claimant may demonstrate:

[B]y clear and convincing evidence that the claimant lived her or his life together with the decedent as a couple in an emotionally and physically intimate partnership such that the intestacy scheme should protect the decedent's interest in donative freedom, or the surviving committed partner's reciprocity or reliance interests, by awarding to the survivor a portion of the decedent's intestate estate.²⁴⁰

1. Factors Evidencing an Emotionally and Physically Intimate Partnership

My proposed statute lists twenty-three factors, grouped into four categories, that the court shall consider and give weight to in making the subjective determination as to whether the claimant has met her burden of showing by clear and convincing evidence that the claimant and the decedent lived life together as a couple

partnership in which the partners cohabited and held themselves out as husband and wife for at least a three-year period immediately preceding the intestate's death).

²⁴⁰ *Infra* Appendix B § (b)(2). I have drafted this phrase with the intent that a court must first find that the claimant and the decedent lived as a couple in an emotionally and physically intimate partnership and, second, must find that their relationship also profoundly implicated at least one, but not necessarily more than one, of the three values—donative intent, reciprocity and reliance. My proposal places the burden on one opposing the qualification of a claimant as a surviving committed partner to demonstrate that the decedent and the claimant did not share physical intimacy at any time during their relationship. *Id.* § (b)(2)(v).

in such an emotionally and physically intimate partnership. Many of these factors derive from and are analogous to factors set out in Professor Waggoner's Working Draft or the American Law Institute's Principles of the Law of Family Dissolution that are to be utilized in a determination of whether a claimant is, respectively, a surviving committed partner or a domestic partner.²⁴¹ The Working Draft utilizes a multi-factor inquiry into whether the claimant's relationship with the decedent was "marriage-like"—that is—"a relationship . . . in which two individuals have chosen to share one another's lives in a long-term, intimate, and committed relationship of mutual caring."²⁴² The Principles

²⁴¹ See *infra* Appendix A § (d); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03(7). Section 6.03(7) of the Principles sets out factors that a court should consider relevant in making its determination as to whether a claimant was a domestic partner:

Whether persons share a life together as a couple is determined by reference to all the circumstances, including:

- (a) the oral or written statements or promises made to one another, or representations jointly made to third parties, regarding their relationship;
- (b) the extent to which the parties intermingled their finances;
- (c) the extent to which their relationship fostered the parties' economic interdependence, or the economic dependence of one party upon the other;
- (d) the extent to which the parties engaged in conduct and assumed specialized or collaborative roles in furtherance of their life together;
- (e) the extent to which the relationship wrought change in the life of either or both parties;
- (f) the extent to which the parties acknowledged responsibilities to each other; as by naming the other the beneficiary of life insurance or of a testamentary instrument, or as eligible to receive benefits under an employee benefit plan;
- (g) the extent to which the parties' relationship was treated by the parties as qualitatively distinct from the relationship either party had with any other person;
- (h) the emotional or physical intimacy of the parties' relationship;
- (i) the parties' community reputation as a couple;
- (j) the parties' participation in a commitment ceremony or registration as a domestic partnership;
- (k) the parties' participation in a void or voidable marriage that, under applicable law, does not give rise to the economic incidents of marriage;
- (l) the parties' procreation of, adoption of, or joint assumption of parental functions toward a child;
- (m) the parties' maintenance of a common household, as defined by Paragraph (4).

Id.

²⁴² *Infra* Appendix A §§ (b), (d). Professor Waggoner chose to focus the multi-factor inquiry on whether a relationship was "marriage-like," in part, because he believed that a judge would be likely to know what "marriage-like" was when she

of the Law of Family Dissolution utilizes a multi-factor inquiry into whether two persons shared “life together as a couple.”²⁴³

I prefer that an intestacy scheme not evaluate and reward a non-marital partnership based on whether or not the relationship was sufficiently “marriage-like”²⁴⁴ because I believe that term is not sufficiently precise²⁴⁵ and also raises distracting political issues.²⁴⁶ I think it preferable to focus the court’s inquiry more directly on the values that the intestacy scheme wishes to promote or reward. Even if we derive those values and, therefore, the desired qualities in a relationship from our appreciation of an ideal of marriage, it should be possible for us to define the requisite qualities of a qualifying committed partnership without making reference to marriage in focusing the court’s inquiry. We

saw it. E-mail from Lawrence Waggoner to Gary Spitko (Dec. 28, 2001) (on file with the author). See also Fellows et al., *Committed Partners*, *supra* note 14, at 27.

There is a substantial benefit of using marital relationships as the standard for evaluating the degree of commitment and the likelihood that the decedent would have intended the person to share in the estate; it is a standard familiar to the courts and one they likely will feel comfortable applying.

Id. Jeffrey G. Sherman, *Domestic Partnership and ERISA Preemption*, 76 TUL. L. REV. 373, 383 (2001) (pointing out how both employers and courts set out criteria for qualification as a domestic partner with reference to the characteristics that “are thought to accompany or constitute marriage”).

²⁴³ PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03(1).

²⁴⁴ See Stephen A. James, “As If They Were Husband and Wife:” A Critique of *De Facto Relationship Property Law in Victoria* 15:1 LAW IN CONTEXT 53, 60-61 (1997) (labeling as “ironic” the notion that recognition of a non-marital partnership would depend upon the degree to which the partners “lived together *as if they were husband and wife*” given that a purpose of the recognition is to acknowledge the diversity of relationships).

²⁴⁵ See *id.* at 61 (arguing that use of marriage-like as a standard “seems to imply a monolithic experience which glosses over diversity even *within* heterosexual marriage”).

²⁴⁶ See Spitko, *Expressive Function*, *supra* note 9, at 1099-102. The author notes the political opposition to treating same-sex relationships as on a par with marital relationships and argues that:

[T]o the extent that a reformed Article II [of the Uniform Probate Code] limits intestate inheritance rights to non-marital relationships with a requisite level of ‘marriage-like’ commitment and responsibility, extension of intestate inheritance rights to same-sex partnerships would necessarily be an acknowledgment that such commitment and responsibility do exist within some gay and lesbian relationships.

Id. See also Fellows et al., *Committed Partners*, *supra* note 14, at 27 (noting that “a statutory requirement that insists on committed couples ‘mimicking’ marriage may be politically unappealing to LGBT communities [because t]hey might reason that it increases the potential of reinforcing heterosexual norms” and “also may be problematic for some opposite-sex couples who have rejected marriage because of its patriarchal underpinnings”).

might consider first the desired qualities of a traditional marriage that we wish to promote or reward in including only certain relationships within our definition of a qualifying committed partnership. We might then draft our definition of a qualifying committed partnership with those qualities explicitly included.²⁴⁷

For example, the American Law Institute's Principles of the Law of Family Dissolution define a "domestic partner" as, "two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple."²⁴⁸ The definition makes no reference to marriage. Yet, the comments to the Principles make clear that the drafters had as a model an ideal of marital life when they drafted a list of factors that would guide the court in deciding whether two partners "shared . . . a life together as a couple."²⁴⁹

I have sought to focus the court's subjective inquiry into the nature of the claimant's relationship with the decedent directly on the values that ground my intestacy scheme by having the court focus on whether the claimant and the decedent lived "as a couple in an emotionally and physically intimate partnership such that the intestacy scheme should protect the decedent's interest in donative freedom, or the surviving committed partner's reciprocity or reliance interests, by awarding to the survivor a portion of the decedent's intestate estate."²⁵⁰ Moreover, in seeking to have the court maintain this focus, I have grouped the enumerated factors that the court must consider into four categories, each of which relates to one prong of this fundamental and ultimate question.

First, the court shall consider and give weight to any factors

²⁴⁷ See Hernandez, *supra* note 135, at 1006-07 ("The functional approach [to defining family] legitimizes non-nuclear relationships that share the essential qualities of traditional relationships for a given context by inquiring whether a relationship shares the main characteristics of caring, commitment, economic cooperation and participation in domestic responsibilities.").

²⁴⁸ PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03(1).

²⁴⁹ *Id.* § 6.03, cmt. e ("Whether parties shared life together as a couple is determined by reference to all the circumstances listed in Paragraph (7), which are intended to ascertain whether the parties conducted themselves as spouses normally do in the course of family life."). See also *id.* § 6.02, cmt. a ("Domestic relationships that satisfy the criteria of § 6.03 closely resemble marriages in function, and their termination therefore poses the same social and legal issues as does the dissolution of a marriage.").

²⁵⁰ See Appendix B § (b)(2).

that tend to demonstrate that the claimant lived or did not live her or his life together with the decedent as a couple in an emotionally and physically intimate partnership, including but not limited to the following factors: evidence that the parties were physically intimate with each other;²⁵¹ whether the couple joined in a marriage ceremony or a commitment ceremony;²⁵² whether the couple registered with an employer as domestic partners, if such registration was an option and would have been beneficial; whether one or both of the parties nominated the other as her or his agent to make health care decisions;²⁵³ the parties' reputation in their community or communities as a couple;²⁵⁴ whether the parties made joint gifts to charity together;²⁵⁵ whether the parties celebrated holidays, their birthdays, and their anniversaries together; whether the parties exchanged with each other symbols of their relationship, such as rings or engraved jewelry;²⁵⁶ and whether the parties agreed to be buried after their deaths next to each other or agreed that the survivor should take possession of the ashes of the first to die.²⁵⁷

Second, the court shall consider and give weight to any factors that tend to demonstrate that the decedent would or would not have wanted her or his estate to provide for the claimant after the decedent's death, including but not limited to the following factors: whether the decedent devised property by will or attempted to do so and, if so, whether the decedent named the claimant as a devisee or attempted to do so;²⁵⁸ whether the dece-

²⁵¹ See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03(7)(h).

²⁵² See *infra* Appendix A § (d)(5); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03(7)(j), (k).

²⁵³ See *infra* Appendix A § (d)(3).

²⁵⁴ See *infra* Appendix A § (d)(6); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03(7)(i).

²⁵⁵ Fellows et al., *Committed Partners*, *supra* note 14, at 63.

²⁵⁶ See *id.* at 59-61 (reporting a survey showing a positive correlation between the surveyed partner having exchanged with her or his partner a symbol of their relationship, such as a ring or other jewelry, and a preference that the surviving partner of a hypothesized non-marital couple take a larger share of the decedent partner's estate).

²⁵⁷ See *id.* at 55 (reporting a survey in which 6.7% of respondents with opposite-sex partners and 5.9% of respondents with same-sex partners had arranged to be buried next to each other).

²⁵⁸ See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03(7)(f). See also Robbennolt & Kirkpatrick Johnson, *supra* note 1, at 441 (reporting that "[o]f those respondents [in a survey of non-marital committed partners] who had wills, . . . [o]ver 90% of respondents with same-sex

dent utilized will substitutes to pass property and, if so, whether the decedent designated the claimant as the recipient of property passing by such will substitutes;²⁵⁹ and written statements made by the decedent, or oral statements made by the decedent in the presence of at least one third-party, in which the decedent expressed the desire that her or his estate be used after her or his death to support the claimant.²⁶⁰

Third, the court shall consider and give weight to any factors that tend to demonstrate that the claimant did or did not engage in care-taking with respect to the decedent or did or did not contribute to the decedent's economic well-being, including but not limited to the following factors: whether the claimant helped the decedent cope with a physical or mental disability; whether the claimant cared for the decedent during a period or periods in which the decedent suffered a serious illness or attempted to recuperate from an injury; whether the claimant helped finance in some significant part the decedent's education or a business venture of the decedent; whether the claimant performed a disproportionate share of the uncompensated domestic services for the couple's household; and whether the claimant contributed a disproportionate share of the financial resources used to maintain the couple's household.

And finally, the court shall consider and give weight to any factors that tend to demonstrate that the claimant did or did not rely upon her relationship with the decedent to the claimant's economic detriment or in a way that fostered the claimant's economic dependence on the decedent, including but not limited to the following factors: whether the claimant sacrificed career or financial opportunities or reallocated her or his financial or personal resources in furtherance of the parties' relationship or common good;²⁶¹ whether the parties relocated to a new community together;²⁶² written statements made by the decedent, or oral statements made by the decedent in the presence of at least one third-party, in which the decedent acknowledged a moral or legal

partners (77 respondents) included their partner as an heir; 40% of respondents with opposite-sex partners (4 respondents) did so").

²⁵⁹ See *infra* Appendix A § (d)(3); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03(7)(f).

²⁶⁰ PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03(7)(a).

²⁶¹ See *id.* § 6.03(7)(e).

²⁶² See *id.*

responsibility for the claimant's financial well-being or a willingness to assume such responsibility;²⁶³ whether the claimant began to co-parent a child after the parties had agreed to co-parent the child provided that the claimant was still financially responsible for the child at the time of the decedent's death;²⁶⁴ the extent to which the parties intermingled their finances, such as by maintaining a joint checking account, savings account or money market account, by making joint investments, or by incurring joint debts;²⁶⁵ and whether the claimant's ability to maintain her or his residence is jeopardized by financial consequences of the decedent's death.

2. Monogamy and Fidelity as Factors to be Considered

Professor Waggoner's Working Draft lists the "degree of exclusivity of the relationship" as a factor that the court shall consider in evaluating the relationship between the claimant and the decedent.²⁶⁶ There is a sound reason to consider including such a factor in my proposed intestacy scheme also. The exclusivity of the parties' relationship is an indication that the parties had committed to the relationship and is some evidence that they "lived . . . life together . . . as a couple in an emotionally and physically intimate partnership."²⁶⁷

Professor Waggoner explains as follows his rationale for in-

²⁶³ See *id.* § 6.03(7)(a).

²⁶⁴ See *infra* Appendix A § (d)(4); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03(7)(l).

²⁶⁵ See *infra* Appendix A § (d)(2); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03(7)(b).

²⁶⁶ See *infra* Appendix A § (d)(1) (listing "the purpose, duration, constancy, and degree of exclusivity of the relationship" among the factors that a court is to consider in determining whether a relationship was "marriage-like"). Professor Waggoner seems to have borrowed this exclusivity prong of his multi-factor approach from the court in *Braschi v. Stahl Associates, Co.*, 543 N.E.2d 49 (N.Y. 1989). See Waggoner, *Marital Property Rights*, *supra* note 18, at 77-78 (quoting *Braschi*). In *Braschi*, the court examined the nature of the relationship between "two adult lifetime partners" for the purpose of determining whether the survivor of the relationship should be entitled to remain in a rent-controlled apartment as a "member of the deceased tenant's family who has been living with the tenant." *Braschi v. Stahl Associates, Co.*, 543 N.E.2d 49, 50, 54 (N.Y. 1989) (emphasis removed). The *Braschi* court called for "an objective examination of the relationship of the parties," focusing on such factors as "the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services." *Id.* at 55.

²⁶⁷ *Infra* Appendix B § (b)(2).

cluding the exclusivity of a relationship among the factors that a court applying the Working Draft is to consider in determining whether a relationship was "marriage-like":

Under most intestacy laws, if one or both *spouses* are unfaithful, the survivor still takes an intestate share. When the parties are not married, however, the behavior of the parties forms the basis of the relationship, and such behavior shows a weakened commitment to the relationship. This is not to say that unfaithfulness during cohabitation precludes a finding that the relationship was marriage-like. The degree to which one or both parties were unfaithful, when it occurred, and so on are just factors to be considered in the overall balance of factors the court should consider in arriving at its conclusion. To be found marriage-like, a relationship need not be like an ideal or perfect marriage.²⁶⁸

Elsewhere, in discussing his Working Draft, Professor Waggoner speaks of the relevance of "whether or not a sexual relationship existed and the extent to which the relationship, during cohabitation, was monogamous."²⁶⁹

I have several concerns with including the exclusivity of a relationship among the factors that a court must consider in evaluating whether a claimant should qualify as a surviving committed partner. In discussing these concerns, and more generally in discussing the exclusivity factor, I think it helpful to distinguish between sexual monogamy and infidelity. Where the parties have agreed that their relationship will not preclude either of them from engaging in sexual intimacy outside of the relationship, such outside intimacy (if it is within the parameters set by the partners) does not equate with infidelity.

A court might find it helpful in applying my proposed multi-factor approach to consider evidence of the exclusivity of the relationship as that term relates to sexual monogamy. Where the parties have committed to the sexual exclusivity of their relationship, that commitment speaks to the broader commitment that they have made to each other and favors a finding that the parties were committed partners within the meaning of my intestacy scheme.²⁷⁰

²⁶⁸ Waggoner, *Marital Property Rights*, *supra* note 18, at 83 n.149 (citations omitted).

²⁶⁹ *Id.* at 83.

²⁷⁰ See Fellows et al., *Committed Partners*, *supra* note 14, at 54 (reporting that 26.7% of survey respondents with an opposite-sex partner and 45.1% of survey respondents with a same-sex partner mentioned "[m]onogamy over an 'extended' pe-

But I question the extent to which the inverse holds. That is, I question whether the fact that two people who have cohabited for at least three years have agreed to live in a relationship that is not sexually exclusive necessarily speaks to any lack of commitment by the parties to the broader relationship. I suspect that a significant proportion of gay male couples who would self-identify as committed partners do not desire sexual exclusivity within their relationship.

I also question the need to evaluate gay relationships against heterosexual norms. I would prefer that an intestacy scheme that recognizes unmarried committed partners respect that many gay couples may decide for themselves that the sexual exclusivity norm presumably accepted by the vast majority of married couples is something they wish to reject. I am wary, therefore, of including within a list of factors that the court must consider in evaluating the nature of the claimant's relationship with the decedent the exclusivity of the relationship, as one can reasonably predict that this factor will disadvantage the survivor of a couple that had rejected the exclusivity norm. My fear is that the connection between marital relationships and sexual monogamy is so close in the minds of so many people that many judges would give disproportionate weight to the lack of such sexual exclusivity in coming to the conclusion that a couple's relationship was not "marriage-like" and, therefore, was not sufficiently committed.

Where the parties had agreed to live in a relationship that is sexually exclusive and one (or both) of the parties was unfaithful, the issue arises—what importance should be given to this infidelity in light of the values that ground my proposed intestacy scheme. Presumably, the answer would depend on the nature of the infidelity—its duration and proximity or remoteness in time from the decedent's death.²⁷¹ The answer also might depend on

riod of time" as a characteristic of their relationship that made the respondent define the relationship as committed).

²⁷¹ See Foster, *Behavior-Based Model*, *supra* note 93 at 101. Professor Foster explains that:

Chinese courts give considerable weight to a wrongdoer's reform and repentance even in the most severe cases of family neglect and abuse Under an express directive from the Supreme People's Court, courts can elect not to order forfeiture of inheritance rights if evidence indicates that the wrongdoer subsequently "repented and mended his or her ways," and the decedent "forgave" the wrongdoer during her lifetime.

Id. Professor Foster further notes that "[s]ome American jurisdictions take a similar

which of the parties—the claimant or the decedent—was unfaithful.

Where the decedent had been unfaithful, one might conclude that the decedent's infidelity evidenced her lack of commitment to the relationship.²⁷² Furthermore, from this supposed lack of commitment, one might infer a lessened likelihood that the decedent would have wanted the claimant to take a portion of the decedent's intestate estate. Thus, relying on evidence of the decedent's infidelity, a court might deny the claimant an intestate share of the unfaithful decedent's estate in order to promote the decedent's presumed donative intent.

The decedent's infidelity would not negate the claimant's contributions to the decedent's well-being during her life or lessen the claimant's reliance interests where the claimant had sacrificed in furtherance of her relationship with the decedent to the claimant's economic detriment. The claimant might still succeed, therefore, in making out a claim to take a portion of the decedent's intestate estate (assuming that the decedent's infidelity was not such that it caused the court to conclude that the claimant and the decedent did not live life together as a couple in an emotionally and physically intimate partnership). But in cases in which an award to the claimant otherwise would have been based on the decedent's presumed intent, considering the decedent's infidelity in an attempt to be faithful to the decedent's intent would come at the high cost of unfairness. Fairness dictates that the party who has suffered her partner's infidelity should not lose her claim to a portion of the decedent's intestate estate on the basis of that infidelity.

Where the claimant herself had been unfaithful, the connection between this infidelity and the values that ground my proposed intestacy scheme appears to be more remote. One might make an argument that the infidelity is relevant in that it speaks to a reverse reciprocity. The argument would be that the claimant's infidelity inflicted emotional harm upon the decedent and this behavior should disqualify the claimant from taking a portion of the injured decedent's intestate estate.²⁷³

approach in cases of spousal or parental abandonment or failure to support the decedent." *Id.* at 102 n.145 (citing N.Y. Est. Powers & Trusts Law §§ 4-1.4(a) (McKinney 1998), 5-1.2(6) (McKinney 1999) and N.C. Gen. Stat. § 31A-2(1) (2001)).

²⁷² See Waggoner, *Marital Property Rights*, *supra* note 18, at 83 n.149 (arguing that infidelity demonstrates "a weakened commitment to the relationship").

²⁷³ Kentucky and Missouri bar an adulterous spouse from taking an intestate

In evaluating this argument, we might benefit from comparing how infidelity is taken into account by a court that is adjudicating financial issues—property division and spousal support claims—upon dissolution of a marriage by divorce.²⁷⁴ The Uniform Marriage and Divorce Act rejects consideration of marital fault²⁷⁵ in the allocation of property and in the awarding of spousal support.²⁷⁶ Likewise, the American Law Institute's Principles of the Law of Family Dissolution reject consideration of marital fault in both property division and spousal support - which the Principles refer to as "compensatory payments."²⁷⁷

share of the decedent spouse's estate where the adultery is coupled with abandonment of the decedent spouse. WAGGONER ET AL. FAMILY PROPERTY LAW, *supra* note 35, at 81 (citing statutes in n.8).

²⁷⁴ No-fault divorce, which is the rule in all fifty states, permits a court to dissolve a marriage without regard to whether or not either or both of the spouses has committed some act of marital fault - such as desertion or adultery. See Ira Mark Ellman, *The Place of Fault in A Modern Divorce Law*, 28 ARIZ. ST. L.J. 773, 775 (1996) [hereinafter Ellman, *Place of Fault*]. Whether the divorce court may or must consider marital fault in making a property division or spousal support award is an entirely separate issue. *Id.* at 775. See also Barbara B. Woodhouse & Katherine T. Bartlett, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525 (1994) (a "conversation" between Professors Bartlett and Woodhouse concerning whether courts should consider marital misconduct in adjudicating property issues at divorce).

²⁷⁵ Marital fault and economic fault should be distinguished. Economic fault is "misconduct that has affected directly the amount of property available for allocation." Ellman, *Place of Fault*, *supra* note 274, at 776-77. All states permit a court to consider economic fault in allocating marital property. *Id.* at 776-77.

²⁷⁶ UNIF. MARRIAGE AND DIVORCE ACT §§ 307 and 308(b) (1983).

²⁷⁷ PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, Chapter 1: Introduction 42-85 (setting out the reasoning behind the Principles' decision to reject consideration of marital fault). In an article published in 1996, Professor Ira Ellman surveyed the law of the fifty states and reported that at least thirty-two states forbid the consideration of marital fault in the allocation of property. Ellman, *Place of Fault*, *supra* note 274, at 782. Of these thirty-two states, however, at least seven allow a court to consider marital fault in the awarding of spousal support. *Id.* at 780. Five additional states that forbid consideration of marital fault in property division "may allow some very limited consideration of misconduct with respect to alimony." *Id.* at 778. Conversely, no state that forbids the use of marital fault in the awarding of spousal support allows its use in division of property. *Id.* at 782. Fifteen states grant to courts the discretion to consider marital fault both in property division and alimony adjudication. *Id.* at 780. Finally, Ellman categorizes three states as "almost pure no-fault states" in that they generally preclude the consideration of marital fault in adjudicating either property division or spousal support, but allow for a "slight possibility" that a court might consider marital fault in deciding these issues in cases of very serious misconduct such as conspiracy to murder the other spouse or serious violent assault against the other spouse. *Id.* at 779. The law of four states—that of Georgia, North Carolina, South Carolina, and West Virginia—provide that a spouse's adultery is a complete bar to that spouse receiving a spousal support award, irrespective of any other circumstances in the

The ALI's position on the relevance of marital fault derives from the theories that ground the Principles' division of marital property and awarding of spousal support.²⁷⁸ With respect to property division, sections 4.09 and 4.10 of the Principles provide generally that, at dissolution of the marriage, each spouse is presumptively entitled to one half of the marital property owned by either spouse.²⁷⁹ This presumption of an equal division of marital property reflects a reciprocity-based theory that the amount of property accumulated during the marriage necessarily reflects the contributions to the marriage of both spouses whether in the home or in the workplace.²⁸⁰

The Principles allow for an award of spousal support to compensate a spouse who has incurred a disproportionate financial loss upon dissolution of the marriage.²⁸¹ The Principles' drafters reason that it is appropriate for the obligor spouse to compensate the obligee spouse in light of the reliance that the marriage has induced and for employment opportunities foregone by the obli-

case. *Id.* at 787 n.30. In many other states, a spouse's infidelity is merely an "appropriate consideration" for the court in adjudicating a spousal support claim. *Id.*

Professor Ellman theorizes that those states that allow consideration of marital fault in an alimony adjudication but not in a property division might be influenced by an acceptance of distinct rationales underlying alimony and property division. *Id.* at 783. He suggests that some of the common law states, in developing their equitable distribution schemes, have come to accept the community property notion that spouses jointly own property acquired by either's labor during the course of their marriage. *Id.* Professor Ellman further suggests that pursuant to this view, a court might think of its role as dividing marital property between its two legal owners, rather than as recognizing the equitable claim of an untitled spouse to the property of the other spouse based upon the course of events during the marriage. *Id.* Ellman concludes that "[i]n dividing property between owners the marital misconduct of the parties seems largely irrelevant." *Id.* Ellman further notes that theory of alimony has not undergone widespread reform, and whether to award alimony and, if so, how much remains largely a matter for the court's discretion. *Id.* at 783-84. "In a system with few bright lines, or even dim ones, it is not surprising that spousal conduct would often be included, along with everything else, among the open-ended list of factors that a court may consider [in adjudicating an alimony claim]." *Id.* at 784.

²⁷⁸ See Ellman, *Place of Fault*, *supra* note 274, at 782-85.

²⁷⁹ PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 4.09 and 4.10 (giving the principles for the division of marital property). Section 4.09(1) provides that generally "marital property and marital debts are divided at dissolution so that the spouses receive net shares equal in value, although not necessarily identical in kind." *Id.* § 4.09.

²⁸⁰ See *id.* § 4.09, cmt. c ("It makes far more sense to ground an equal-division presumption on the spouses' contribution to the entire marital relationship, not just to the accumulation of financial assets.").

²⁸¹ *Id.* § 5.03 (listing kinds of compensatory awards).

gee spouse so that he or she might care for the couple's children.²⁸²

The marital misconduct of either spouse is not relevant to these inquiries into the reciprocity and reliance interests of the spouses.²⁸³ It is consistent with these theories, therefore, that the Principles forbid the court from considering a spouse's infidelity or other marital fault in the division of marital property or the awarding of compensatory payments. Similarly, it would not be consistent with the reciprocity and reliance rationales that ground my proposed intestacy scheme to deny an intestate share to an otherwise qualified surviving committed partner on the basis of that partner's infidelity.²⁸⁴

I have attempted to balance my concerns with allowing a court

²⁸² Ellman, *Place of Fault*, *supra* note 274, at 784. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 5.05, cmt. a (noting that the loss in earning capacity arising from assumption of primary caretaker duties "is ordinarily incurred in the expectation that the marriage will endure and the primary caretaker will continue to share in the income of the other parent").

²⁸³ See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, Chapter 1: Introduction at 48 (stating that "[m]arital misconduct . . . would typically have no logical connection to the factual foundation upon which Chapter 5's presumptions of entitlement are based"); *id.* at 66-67 (noting that property allocation and alimony rules were not designed to measure or satisfy compensation claims for physical violence or emotional abuse); Ellman, *Place of Fault*, *supra* note 274, at 785 ("Assessments of misconduct have no logical connection to the factual foundation upon which Chapter 5's presumptions of entitlement are based.").

²⁸⁴ Professor Ellman has considered whether the use of fault in an alimony adjudication might be appropriate to vindicate some interests other than reliance and reciprocity. Ellman, *Place of Fault*, *supra* note 274, at 785-86. He argues that consideration of marital fault in such a proceeding can only be grounded in two rationales: to punish the spouse who has engaged in misconduct, or to compensate the spouse who has been harmed by such misconduct. *Id.* at 786. Professor Ellman, for the most part, rejects both of these rationales. *Id.* at 788-92. *But see id.* at 803 (suggesting that it might be appropriate to adopt in adjudications of the financial aspects of dissolution a forfeiture rule for very serious misconduct—such as the attempted murder of one's spouse).

One line of reasoning adopted by some courts considering this issue incorporates both the punishment and compensation rationales. In most cases of divorce, the dissolution of the marriage results in increased costs arising from the need at dissolution to maintain two households. Some courts reason that these increased costs should be borne by the party whose marital fault caused the breakdown of the marriage. *Id.* at 788. Thus, the court punishes the wrongdoer while at the same time compensating the innocent spouse. Professor Ellman criticizes this reasoning: He argues that it is too difficult to determine if the marital fault actually caused the marital breakdown. *Id.* at 788 (asking "[w]as the marital breakdown . . . caused by one spouse's adultery or the other's emotional insensitivity?", and arguing that "[t]he court's answer tells us which conduct it finds more blameworthy, not which functioned as the cause of the other.").

to consider the sexual exclusivity of the parties' relationship and my belief that such sexual exclusivity is compelling evidence in favor of a finding that the parties enjoyed an emotionally and physically intimate partnership. My proposal provides that:

If the court finds that the parties lived together in a sexually exclusive relationship during their cohabiting partnership, the court shall weigh this factor in favor of finding that the parties lived life together in an emotionally and physically intimate partnership. The court shall not otherwise consider evidence relating to the sexual exclusivity of the parties' relationship.²⁸⁵

My proposal would allow a claimant to introduce evidence concerning the sexual exclusivity of the partners' relationship. Only if the claimant chooses to introduce such evidence, would those opposing the claimant be entitled to introduce evidence on

Of course, this dual costs rationale, which requires an inquiry into who is to blame for the breakup of the marriage, has no application in the discussion of the appropriate distribution of an intestate estate. The intestate's partnership has ended not because of the marital fault of either party, but rather because of the death of the intestate. Therefore, the infidelity or other marital fault of the intestate or her surviving partner has not caused a need for the maintenance of two households.

Professor Ellman further rejects the argument that marital fault should be used in adjudicating the financial consequences of divorce to punish the guilty party who has inflicted non-financial injuries on her spouse or to compensate the innocent party who has incurred such non-financial injuries. *Id.* at 789-92. Such non-financial injuries might include both emotional harm and physical harm. *Id.* at 790-91. Professor Ellman argues that where the harm is serious, tort law (pursuant to such causes of action as intentional or negligent infliction of emotional distress and battery or assault actions) is better able to punish the guilty party and to compensate the victim. *Id.* at 791. "In short, a fault rule would serve compensation functions that may already be served by the tort law. Such duplication is inadvisable. There is no reason to reinvent compensation principles under the rubric of fault adjudications, nor to incorporate tort principles into divorce adjudications." *Id.*

²⁸⁵ *Infra*, Appendix B § (b)(2)(v). My proposal is silent with respect to whether an intestate decedent might be survived by more than one surviving committed partner, as the proposal defines that term. Given that my proposal does not require that the intestate and a claimant have been in a monogamous relationship for the claimant to qualify as a surviving committed partner, it would seem quite possible that an intestate might be survived by two or more persons who could be qualified under the multi-factor approach as a surviving committed partner. In such a case, the court should calculate the total amount of property awarded to the surviving committed partners based on the duration of the longest cohabiting partnership period. The court might then equitably apportion among the qualified surviving committed partners that portion of the intestate estate so calculated taking into account such factors as the comparative duration of the claimants' relationships with the decedent and the comparative reciprocity, reliance, and donative intent values implicated by each relationship. The task would be quite similar to the equitable apportionment performed by a court faced with the competing claims on an estate of a legal spouse and one or more putative spouses or simply multiple putative spouses. *See supra* note 104-07, and accompanying text (discussing the putative spouse doctrine).

the point. If the court finds the opponents' rebuttal evidence convincing, the court will not weigh the exclusivity of the parties' relationship in the claimant's favor. The court may not, however, use a finding of non-exclusivity to justify denial of the survivor's claim.

If my concern that some judges would give undue weight to a lack of sexual exclusivity is justified, then it is likely that some judges would find it difficult to ignore evidence of non-exclusivity in evaluating the nature of the partners' relationship, even when the relevant statute directs that a court may not consider such evidence. Some judges may not be able to unring the bell. My proposal mitigates this danger in that it gives to the claimant control over whether any evidence of sexual exclusivity or the lack thereof will be heard by the court.

CONCLUSION

As an increasing percentage of persons in our society structure family lives outside of the conventional nuclear family, family property law is faced with the challenge of evolving to meet better the needs of these non-conventional families. One approach to reform would focus on form and would offer new objective statuses for which family members could register and to which inheritance rights would attach. This approach possesses the twin virtues of certainty and ease of administration. The focus on form would leave outside inheritance law's protection, however, those persons who functioned as we would hope a family member would function but who failed to register formally for the necessary state designation.

An alternative approach to reform would focus on function. Inheritance law would acknowledge as family members of a decedent those persons who related with the decedent in such a way that we think it appropriate to recognize the person as family, perhaps because we wish to encourage and reinforce such behavior. The single most salient objection to application of the functional approach in inheritance law has been the perceived difficulty of determining, in the absence of a bright line registration system, who counts as a family member. Yet, the functional approach is consistent with the recent de-emphasis of formalism in succession law. And in principle, if the question is properly framed and a court's discretion is properly constrained, the question of whether the decedent and the claimant functioned as par-

ent and child or as committed partners is no more indeterminate than other issues that modern probate courts confront and resolve every day—issues such as whether the decedent intended for a document that she failed to execute with testamentary formalities to be her will, whether she intended by revocation of a will to revive an earlier will, and certainly whether she executed a testamentary document with sufficient mental capacity and free of undue influence.

With respect to the treatment of unmarried committed partners, I propose a hybrid approach to reform that both offers a registration option and utilizes a multi-factor test for function. My proposal's registration option would offer a certain safe harbor for those partners who seek to protect each other from disinheritance. The multi-factor prong of my proposal would allow a court to grant intestate inheritance rights to the survivor of an unregistered partnership where the claimant shows by clear and convincing evidence that she and the decedent lived together in an emotionally and physically intimate partnership and that their relationship profoundly implicated at least one of the three values at the center of the court's inquiry: respect for the decedent's intent to provide at death for the survivor, or protection of the survivor's reciprocity or reliance interests in the partnership.

My proposal seeks to constrain the court's discretion and narrow the question for the court's analysis by setting out twenty-three factors relating to the values grounding my proposal that the court shall consider in determining whether a claimant qualifies as a surviving committed partner. The accrual feature of my proposal also promotes these values and reduces the uncertainty that might arise from use of a multi-factor analysis in the administration of an estate. Based on the assumption that there generally is a direct relationship between the duration of the cohabiting partnership and the degree to which the relationship implicated the donative intent, reciprocity and reliance interests at issue, my accrual method increases the intestate share awarded to a surviving committed partner as the duration of the cohabiting partnership increases. The accrual method also serves the value of administrative convenience: It provides a disincentive to litigate in the difficult cases of a short-term cohabiting partnership because the portion of the intestate estate at issue in such cases will be small. Similarly, the accrual method reduces the likelihood of a court making a costly "wrong" decision as to

whether the claimant should qualify as a committed partner because the close-call short-term cohabiting partnership cases will involve only a small portion of the intestate estate.

APPENDIX A

WORKING DRAFT—INTESTATE SHARE OF COMMITTED
PARTNER, LAWRENCE W. WAGGONER,
JANUARY 20, 1995

(a) [*Amount.*] If an unmarried, adult decedent dies without a valid will and leaves a surviving committed partner, the decedent's surviving committed partner is entitled to:

(1) the first [\$50,000], plus one-half of any balance of the intestate estate, if:

(A) no descendant or parent of the decedent survives the decedent; or

(B) all of the decedent's surviving descendants are also descendants of the surviving committed partner and there is no other descendant of the surviving committed partner who survives the decedent;

(2) one half of the intestate estate, in cases not covered by paragraph (1).

(b) [*Committed Partner; Requirements.*] To be the decedent's committed partner, the individual must, at the decedent's death: (i) have been an unmarried adult; (ii) not have been prohibited from marrying the decedent under the law of this state by reason of a blood relationship of the decedent; and (iii) have been sharing a common household with the decedent in a marriage-like relationship. Only one individual can qualify as the decedent's committed partner for purposes of this section.

(c) [*Common Household.*] For purposes of subsections (b) and (e), "sharing a common household" or "shared a common household" means that the decedent and the individual shared the same place to live, whether or not one or both had other places to live and whether or not one or both were physically residing somewhere else at the decedent's death. The right to occupy the common household need not have been in both of their names.

(d) [*Marriage-like Relationship; Factors.*] For purposes of subsection (b), a "marriage-like relationship" is a relationship that corresponds to the relationship between marital partners, in which two individuals have chosen to share one another's lives in a long-term, intimate, and committed relationship of mutual caring. Although no single factor or set of factors determines

whether a relationship qualifies as marriage-like, the following factors are among those to be considered:

(1) the purpose, duration, constancy, and degree of exclusivity of the relationship;

(2) the degree to which the parties intermingled their finances, such as by maintaining joint checking, credit card, or other types of accounts, sharing loan obligations, sharing a mortgage or lease on the household in which they lived or on other property, or titling the household in which they lived or other property in joint tenancy;

(3) the degree to which the parties formalized their legal obligations, intentions, and responsibilities to one another, such as by one or both naming the other as primary beneficiary of life insurance or employee benefit plans or as agent to make health care decisions;

(4) whether the couple shared in co-parenting a child and the degree of joint care and support given the child;

(5) whether the couple joined in a marriage or a commitment ceremony, even if the ceremony was not of the type giving rise to a presumption under subsection (e)(3); and

(6) the degree to which the couple held themselves out to others as married or the degree to which the couple held themselves out to others as emotionally and financially committed to one another on a permanent basis.

(e) [*Presumption.*] An individual's relationship with the decedent is presumed to have been marriage-like if:

(1) during the [six] year period next preceding the decedent's death, the decedent and the individual shared a common household for periods totaling at least [five] years;

(2) the decedent or the individual registered or designated the other as his [or her] domestic partner with and under procedures established by an organization and neither partner executed a document terminating or purporting to terminate the registration or designation;

(3) the decedent and the individual joined in a marriage or a commitment ceremony conducted and contemporaneously certified in writing by an organization; or

(4) the individual is the parent of a child of the decedent, or is or was a party to a written co-parenting agreement with the decedent regarding a child, and if, in either case, the child lived

before the age of 18 in the common household of the decedent and the individual.

(f) [*Force of the Presumption.*] If a presumption arises under subsection (e) because only one of the listed factors is established, the presumption is rebuttable by a preponderance of the evidence. If more than one of the listed factors is established, the presumption can only be rebutted by clear and convincing evidence.

APPENDIX B
AN ACCRUAL/MULTI-FACTOR APPROACH TO
INTESTATE INHERITANCE RIGHTS FOR
UNMARRIED COMMITTED PARTNERS

(a) [*Amount.*] The surviving committed partner of an unmarried adult decedent shall be entitled to take the following portion of the decedent's intestate estate:

(1) Subject to parts (2), (3), and (4)

If the decedent and the surviving committed partner cohabited in a partnership <i>for a period of:</i>	The unreduced intestate share percentage is:
at least 3 years but less than 4 years	18% of the intestate estate
at least 4 years but less than 5 years	24% of the intestate estate
at least 5 years but less than 6 years	30% of the intestate estate
at least 6 years but less than 7 years	36% of the intestate estate
at least 7 years but less than 8 years	42% of the intestate estate
at least 8 years but less than 9 years	48% of the intestate estate
at least 9 years but less than 10 years	54% of the intestate estate
at least 10 years but less than 11 years	60% of the intestate estate
at least 11 years but less than 12 years	68% of the intestate estate
at least 12 years but less than 13 years	76% of the intestate estate
at least 13 years but less than 14 years	84% of the intestate estate
at least 14 years but less than 15 years	92% of the intestate estate
at least 15 years or more	100% of the intestate estate.

(i) The decedent and the claimant cohabited if they shared the same place to live, whether or not one or both had other places to live and whether or not one or both were physically residing somewhere else at the decedent's death.

(ii) The cohabitation period is the appropriate measure for determining the unreduced intestate share percentage even in cases in which the decedent qualifies as a surviving committed partner by virtue of having registered along with the decedent as each others' domestic partner in accordance with the State's requirements and procedures for the registration of domestic partnerships. The duration of the registered domestic partnership is not the appropriate measure for determining the unreduced intestate share percentage.

(2) If the decedent left one or more surviving descendants who are not also descendants of the surviving committed partner, the intestate share percentage shall be reduced by one-half.

(3) If the decedent is not survived by any descendant but is

survived by at least one parent, the intestate percentage shall be reduced by one-quarter.

(4) If the partnership between the decedent and the surviving committed partner fractured prior to the decedent's death and remained fractured at the time of the decedent's death, the intestate share percentage shall be reduced as follows after and as applied to the product of any reduction under parts (a)(2) or (a)(3):

(i) If the partnership fractured in the year prior to the decedent's death and remained fractured at the decedent's death, the intestate share percentage shall be reduced by 50%.

(ii) If the partnership fractured more than one year prior to the decedent's death but less than two year's prior to the decedent's death and remained fractured at the decedent's death, the intestate share percentage shall be reduced by 75%.

(iii) If the partnership fractured more than two years prior to the decedent's death and remained fractured at the decedent's death, the intestate share percentage shall be reduced to zero.

(iv) If the fracture of the partnership led to a distribution of the parties' assets pursuant to contract or statute, the intestate share percentage shall be reduced to zero.

(b) [*Committed Partner; Requirements.*] A surviving committed partner is one who, at the decedent's death, was an unmarried adult, who would not have been prohibited under this State's law from marrying the decedent on account of the blood or adoptive relationship between the claimant and the decedent, and who

(1) during the decedent's life registered along with the decedent as each others' domestic partner in accordance with the State's requirements and procedures for the registration of domestic partnerships; or

(2) demonstrates by clear and convincing evidence that the claimant lived her or his life together with the decedent as a couple in an emotionally and physically intimate partnership such that the intestacy scheme should protect the decedent's interest in donative freedom, or the surviving committed partner's reciprocity or reliance interests, by awarding to the survivor a portion of the decedent's intestate estate. In determining whether the claimant has met her or his burden of showing by clear and convincing evidence that the claimant and the decedent lived life together as a couple in such an emotionally and physi-

cally intimate partnership, the court shall consider and give weight to the following factors to the extent that such factors are not excluded from consideration by part (v):

(i) Any factors that tend to demonstrate that the claimant lived or did not live her or his life together with the decedent as a couple in an emotionally and physically intimate partnership, including but not limited to the following factors: evidence that the parties were physically intimate with each other; whether the couple joined in a marriage ceremony or a commitment ceremony; whether the couple registered with an employer as domestic partners, if such registration was an option and would have been beneficial; whether one or both of the parties nominated the other as her or his agent to make health care decisions; the parties' reputation in their community or communities as a couple; whether the parties made joint gifts to charity together; whether the parties celebrated holidays, their birthdays, and their anniversaries together; whether the parties exchanged with each other symbols of their relationship, such as rings or engraved jewelry; whether the parties agreed to be buried after their deaths next to each other or agreed that the survivor should take possession of the ashes of the first to die;

(ii) Any factors that tend to demonstrate that the decedent would or would not have wanted her or his estate to provide for the claimant after the decedent's death, including but not limited to the following factors: whether the decedent devised property by will or attempted to do so and, if so, whether the decedent named the claimant as a devisee or attempted to do so; whether the decedent utilized will substitutes to pass property and, if so, whether the decedent designated the claimant as the recipient of property passing by such will substitutes; written statements made by the decedent, or oral statements made by the decedent in the presence of at least one third party, in which the decedent expressed the desire that her or his estate be used after her or his death to support the claimant;

(iii) Any factors that tend to demonstrate that the claimant did or did not engage in care-taking with respect to the decedent or did or did not contribute to the decedent's economic well-being, including but not limited to the following factors: whether the claimant helped the decedent cope with a physical or mental disability; whether the claimant cared for the decedent during a period or periods in which the decedent suffered a serious illness

or attempted to recuperate from an injury; whether the claimant helped finance in some significant part the decedent's education or a business venture of the decedent; whether the claimant performed a disproportionate share of the uncompensated domestic services for the couple's household; whether the claimant contributed a disproportionate share of the financial resources used to maintain the couple's household;

(iv) Any factors that tend to demonstrate that the claimant did or did not rely upon her relationship with the decedent to the claimant's economic detriment or in a way that fostered the claimant's economic dependence on the decedent, including but not limited to the following factors: whether the claimant sacrificed career or financial opportunities or reallocated her or his financial or personal resources in furtherance of the parties' relationship or common good; whether the parties relocated to a new community together; written statements made by the decedent, or oral statements made by the decedent in the presence of at least one third party, in which the decedent acknowledged a moral or legal responsibility for the claimant's financial well-being or a willingness to assume such responsibility; whether the claimant began to co-parent a child after the parties had agreed to co-parent the child provided that the claimant was still financially responsible for the child at the time of the decedent's death; the extent to which the parties intermingled their finances, such as by maintaining a joint checking account, savings account or money market account, by making joint investments, or by incurring joint debts; whether the claimant's ability to maintain her or his residence is jeopardized by financial consequences of the decedent's death.

(v) The burden shall be on one opposing the qualification of a claimant as a surviving committed partner to demonstrate that the decedent and the claimant did not share physical intimacy at any time during their relationship. If the court finds that the parties lived together in a sexually exclusive relationship during their cohabiting partnership, the court shall weigh this factor in favor of finding that the parties lived life together in an emotionally and physically intimate partnership. The court shall not otherwise consider evidence relating to the sexual exclusivity of the parties' relationship.

(c) [*Standing to Challenge the Decedent Partner's Will.*] Unless no other heir, aside from a claimed surviving committed partner,

or no other group of heirs, not including a claimed surviving committed partner, has a net pecuniary interest in challenging respectively the decedent's will, or any individual provision in the will, equal to or greater than the net pecuniary interest of the claimed committed partner in challenging respectively the decedent's will, or any individual provision in the will, no person who would take less than 50% of the decedent's intestate estate as the surviving committed partner shall have standing to challenge a decedent's will, or individual provision in the will, by virtue of the fact that the person is or claims to be the testator's surviving committed partner. This provision shall not defeat a person's standing to challenge a decedent's will where standing is asserted on some basis other than the challenger's claimed status as the decedent's surviving committed partner.

